FILE COPY

APR 27 193
CHARLES ELMORE CR
CL

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 838.

FREDERICK L. MOREHEAD, as Warden of the City Prison of the Borough of Brooklyn,
Petitioner,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

GATES & LEVITT,
Attorneys for Respondent,
415 Lexington Avenue,
New York, N. Y.

NATHAN L. MILLER,
15 Broad Street, New York, N. Y.,

ARTHUR LEVITT,
HAROLD ALLEN GATES,
415 Lexington Avenue, New York, N. Y.,

CHALLEN B. ELLIS,
Southern Building, Washington, D. C.,
of Counsel.

ACKERMAN PRESS, Inc., 142 Liberty St., 'Phones Rector 2-5356-7

INDEX.

STATEMENT.

	PAGE
The Nature of the Proceeding	1
Opinions and Jurisdiction	2
The Statute	3
Summary of Argument	6

ARGUMENT.

Part I.	Analysis of the Statute in the light of principles in *Adkins* v. *The Children's Hospital* and the contentions of the Petitioner	10
	(1) The so-called standard	10
	(2) The scope of *Adkins* v. *The Children's Hospital*	17
	(3) The alleged change in conditions	22
	(4) The interference with fundamental rights regardless of standard	23
	(5) The ends sought are the same as in previous price-fixing schemes for labor	29
Part II.	Fundamental principles of valid legislative price-fixing are decisive in this case	33
	1. Rules governing price-fixing	33

PAGE

A. Freedom from price-fixing is the rule and not the exception 35

B. The desirability of price-fixing and the difficulty in dealing with evils by other methods no warrant for interference with freedom of contract 36

C. Rate-making, being a taking of property for supposed public benefit, must comply with the requirements of just compensation 38

D. Price-fixing is justified only as a protection to the consuming and using public, and the price regulated is the price paid by the public 40

2. Basis for the distinction between wages of employees and rates for the use of property in constitutional price-fixing 42

3. Review of cases illustrating and applying the distinction 47

Conclusion 55

Appendix A—Opinions of the Court of Appeals 57

Appendix B—Mandatory Order and Regulations of Commissioner 82

TABLE OF CASES.

PAGES

Adair v. United States (208 U. S. 161, 174-175) 24, 36, 47
Adams v. Tanner (244 U. S. 590) 50
Adkins v. Children's Hospital (261 U. S. 525, 555, 557, 559) 2, 10, 17, 18, 19, 21, 30, 33, 50, 54
Allgeyer v. Louisiana (165 U. S. 578, 589) 24

Bailey v. Drexel Furniture Co. (259 U. S. 20, 37) 37
Board v. New York Telephone Co. (271 U. S. 23, 31) 39
Bosley v. McLaughlin (236 U. S. 385) 49
Bunting v. Oregon (243 U. S. 426) 26, 27, 50
Butchers' Union Co. v. Crescent City Co. (111 U. S. 746, 757) 24

Coppage v. Kansas (236 U. S. 1, 14, 18) 25, 27, 32, 49
Cotting v. Kansas City (183 U. S. 79, 91) 39

Donham v. West-Nelson Mfg. Co. (273 U. S. 657) 19, 30, 33, 54
Dunham v. Ottinger (243 N. Y. 423) 16

Erie Railroad Co. v. Williams (233 U. S. 685) 24, 48

Fairmont Creamery Co. v. Minnesota (274 U. S. 1, 10) 54
Frisbie v. United States (157 U. S. 160) 47

Hicklin v. Coney (290 U. S. 169, 172) 17
Holcombe v. Creamer (231 Mass. 99) 26, 27
Holden v. Hardy (169 U. S. 366, 392, 397) 22, 43, 47
Home Bldg. & Loan Assn. v. Blaisdell (290 U. S. 398, 439) 28
Hurtado v. California (110 U. S. 516, 535, 536) 36, 37

Kent Stores of New Jersey, et al., v. Wilentz, Atty. Gen. (U. S. Law Weekly, March 24, 1936) 54
Knights of Pythias v. Meyer (265 U. S. 30, 32) 17
Knoxville Iron Co. v. Harbison (183 U. S. 13) 23, 47

McKeen v. Delancy's Lessee (5 Cranch. 22, 32) 17
McLean v. Arkansas (211 U. S. 539) 23, 48

PAGES

Meyer v. Nebraska (262 U. S. 390, 399-400) 25
Miller v. Wilson (236 U. S. 373) 49
Muller v. Oregon (208 U. S. 412) 48
Murphy v. Sardell (269 U. S. 530) 19, 30, 33, 51, 54

Near v. Minnesota (283 U. S. 697, 707-708) 20, 26, 34
Nebbia v. New York (291 U. S. 502, 538) 22, 41

O'Gorman & Young v. Hartford Insurance Co. (282 U. S. 251) 22, 26, 27, 41

Patterson v. Bark Eudora (190 U. S. 169) 35, 47
Pennsylvania Coal Co. v. Mahon (260 U. S. 394, 415, 416) 37
Prudential Ins. Co. v. Cheek, 259 U. S. 530, 536 25

Radice v. New York (264 U. S. 292) 51, 54
Ribnik v. McBride (277 U. S. 350, 356, 357, 358) 35, 38, 45, 52
Riley v. Mass. (232 U. S. 671) 48

Smith v. Texas (233 U. S. 630) 48
Smyth v. Ames (169 U. S. 466, 547) 39

Tagg Brothers v. United States (280 U. S. 420) 42, 52
Tioga R. R. v. Blossburg & Corning R. R. (20 Wall. 137, 143) 17
Truax v. Raich (239 U. S. 33, 41) 25, 43, 49
Tyson and Brother v. Banton (273 U. S. 418, 442, 445) 30, 37, 51, 54

West v. C. & P. Telephone Co. (295 U. S. 662, 671) 39
Wichita R. R. & Light Co. v. Public Utilities Comm. (260 U. S. 48, 59) 12
Wilson v. New (243 U. S. 332) 49
Wolff Co. v. Court of Industrial Relations (262 U. S. 522, 534, 539, 540, 544) 20, 26, 42, 45, 50, 54

STATUTES CITED.

	PAGES
Laws of Arizona, 1923, Ch. 3	19
Laws of Arkansas, 1915, 1919, 1921 (Crawford & Moses' Digest, Secs. 7102-7114)	19
Laws of New Jersey, 1935, Ch. 281	54
Laws of New York, 1933, Ch. 584	2, 3, 10

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 838.

FREDERICK L. MOREHEAD, as Warden of the City Prison of the Borough of Brooklyn,

Petitioner,

vs.

PEOPLE ex rel. JOSEPH TIPALDO,

Respondent.

BRIEF FOR RESPONDENT.

Nature of the Proceeding.

The case comes to this Court on writ of certiorari under Section 237 (b) of the Judicial Code, Section 344 (b), U. S. C. A., to the Supreme Court of New York to review an order entered March 9, 1936 (R. 19), on the remittitur of the Court of Appeals of New York (R. 18) reversing an order of the Special Term of the Supreme Court of New York (R. 7) and discharging the relator in a *habeas corpus* proceeding.

The charge against the relator was non-compliance with an order of the Industrial Commissioner of New York establishing minimum wages for women and children in laundries, made pursuant to Chapter 584 of the Laws of New York of 1933 (R. 4).

Opinions and Jurisdiction.

The opinion of the Special Term is reported in 156 Misc. Rep. 522; 282 N. Y. Supp. 576; and will be found at page 8 of the Record.

The opinions of the Court of Appeals, reported in 270 N. Y. 233, are not printed in the Record, but are annexed as an Appendix to this brief.

The claim of the relator was that the statute violated the 14th Amendment of the Federal Constitution and Article I, Section 6, of the New York State Constitution (R. 4).

The Court of Appeals decided the case on the authority of *Adkins* v. *The Children's Hospital* (261 U. S. 525), decided under the Fifth Amendment.

Article I, Section 6, of the New York State Constitution says, "No person shall * * * be deprived of life, liberty or property without due process of law". The 14th Amendment of the Federal Constitution says, "nor shall any State deprive any person of life, liberty, or property, without due process of law". As Chief Judge Crane said, "both provisions are the same in this particular" (Appendix, p. 57).

Obviously the decision would have been the same irrespective of whether the case had been decided under Article I, Section 6, of the New York State Constitution or under the 14th Amendment of the Federal Constitution. The remittitur states that a question under the Federal Constitution was presented and necessarily passed upon (R. 18). It is for this Court to decide the question of its own jurisdiction.

The Statute.

The pertinent provisions of the statute, which is annexed as an Appendix to the brief of the Attorney General of New York, are the following:

"*Sec. 551. Definitions.* As used in this article:

* * * * * *

"7. 'An oppressive and unreasonable wage' shall mean a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health.

"8. 'A fair wage' shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

* * * * * *

"*Sec. 552. Contracts of employment void as against public policy.* It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hun-

dred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void.

"*Sec. 555. Constitution of wage board.*

* * * * * *

"4. Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate. If its report is not submitted within such time the commissioner may constitute a new wage board.

"5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality.

"6. A wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations.

"*Sec. 558. Special licenses.* For any occupation for which minimum fair wage rates have been established the commissioner or the director may cause to be issued to a woman or minor, including a learner or ap-

prentice, whose earning capacity is impaired by age or physical or mental deficiency or injury, a special license authorizing employment at such wages less than such minimum fair wage rates and for such period of time as shall be fixed by the commissioner or the director and stated in the license.

"*Sec. 563. Right of review.* All questions of fact arising under this act except as otherwise herein provided shall be decided by the commissioner or the director and there shall be no appeal from the decision of the commissioner or the director on any such question of fact, but there shall be a right of review by the industrial board and the courts as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director.

"*Sec. 565. Penalties.*

* * * * * *

"2. Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which such employee is paid less than the rate applicable to him under a mandatory minimum fair wage order and each employee so paid less shall constitute a separate offense."

SUMMARY OF ARGUMENT.

I. Analysis of the Statute in the Light of Principles in Adkins v. The Children's Hospital (261 U. S. 525) and the Contentions of the Petitioner.

(1) Wholly apart from the fundamental ground of invalidity, the challenged statute vests the Wage Board and the Industrial Commissioner with arbitrary power.

(2) The case is ruled by the *Adkins* case, twice reaffirmed by this Court.

(3) No change has occurred since its decision to justify a departure from the Adkins case.

(4) Regardless of standard the right invaded is one of the inalienable rights guaranteed to the citizen in a free country.

(5) The ends sought are the same as in previous price-fixing schemes for labor. The direct end is private and the public interest asserted as a justification for the exercise of the police power is indirect.

II. Fundamental Principles of Valid Legislative Price-Fixing Are Decisive in This Case.

(1) The principles upon which the question of the legality of price-fixing for labor must be decided have been settled in a long line of decisions of this Court interpreting the Fifth and Fourteenth Amendments.

A. The first of these principles is that immunity from price-fixing is the rule and not the exception.

B. The second principle is that desirability of the legislation as a speedy remedy for the supposed evils, and the difficulty of dealing with the supposed evils by other methods, constitute no warrant for resort to price-fixing.

C. The third principle is that price-fixing, being a direct taking of property for a supposed public benefit, can not be resorted to unless "just compensation" is given in return, and that just compensation requires an adequate and reasonable return upon the fair market value of that which is devoted to public use, or, as it is sometimes expressed, "affected with a public interest".

D. The fourth principle is that whatever the ground may be upon which price-fixing of the use of property is justified—whether it be because the property is "devoted to a public use", "affected with a public interest" or the business in which the property is used is of such a nature that "unrestricted competition is an inadequate safeguard" to the public—the limit of such price-fixing is that it must be in relation to the price which is charged to the public as a whole and may not be extended to dealings not with the public but within the organization conducting the business, as for example, the relation of employer to employees.

(2) These principles suggest the vital distinctions, from the constitutional standpoint, in all legislative price-fixing between *property* and the use of property, on the one hand, and *personal services*, on the other.

A. First, property originates with the state and reverts to the state; it is held in a sense at the will of the state.

B. Second, property may be taken by the state for public use. This power is inherent in the state. But liberty—personal services—may not be taken by the state for public use or any other use except as a punishment for crime or in time of war.

C. Third, property, in our theory of government, always has its equivalent in money or other thing of value. So when property is taken for public use, either by taking the property directly or by taking indirectly by diminishing the income from the property, this equivalent may always be given in return, and thus the amount of property held by the individual is not diminished or impaired.

D. Fourth, so when the use of property is regulated by price-fixing, the constitutional guaranty that property shall not be taken without just compensation may be fulfilled; but when *personal services* are regulated by price-fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

E. Fifth, it follows from these rules as to property and as to personal services that, just as *property* may be taken for a public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, personal services which *can not* be taken for a public use, also, by their very nature, *can not* be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether the characterization of "public use" is by judicial reasoning or legislative declaration.

(3) Cases illustrating and applying the distinction reviewed.

(4) No change has taken place since the decision of this Court in *Adkins* v. *The Children's Hospital* (261 U. S. 525) which would warrant a reversal of that case, nor has any aspect of minimum wage laws developed which was not considered and determined in that case.

ARGUMENT.

PART I.

Analysis of the statute in the light of principles in Adkins v. The Children's Hospital (261 U. S. 525) and the contentions of the petitioner.

(1) THE SO-CALLED STANDARD.

The statute (Section 551, subdivision 7, and Section 552; p. 3, *supra*) prohibits what it defines as "an oppressive and unreasonable wage", i. e., one which is "both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health". Plainly the Wage Board may not recommend or the Commissioner prescribe a wage prohibited by the statute. The minimum wage prescribed must therefore be "a fair wage" and must not be "an oppressive and unreasonable wage" as those terms are defined by the statute, and so the Court of Appeals held.

Both of those standards are arbitrary. Both are so vague and indefinite as to leave the matter to the arbitrary decision of the Board and the Commissioner. Nothing needs to be added to what this Court has already said in respect of the living wage standard (*Adkins* v. *Children's Hospital*, 261 U. S. 525, 555-559).

The "fair wage" standard is subject to the same objections and is even more impossible of practical application. As defined by the statute, the "fair wage" is not the "reasonable value of the services rendered", but a wage "fairly and reasonably commensurate with the value of the service or *class of service* rendered" (*supra*, p. 3). Whatever that may mean, it obviously does not purport to base the wage standard for an occupation upon the reasonable value of particular service but only of the *class of service*. A standard is to be set up for the service or *class of serv-*

ice which takes no account whatever and can take no account whatever of the capacity, experience, training, industry or earning power of the employee, the character of the place where the work is done or the circumstances or surroundings of the employment.

The statute prescribed no rule or standard of measure whatsoever. It says that the Board "(1) *may* take into account all relevant circumstances affecting the value of the service or class of service rendered", and "(2) *may* be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid", and "(3) *may* consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards" (*supra*, p. 3).

(1) is meaningless. (3) permits the Board to take into account the wages paid by employers whose wage rates the Board finds to be "fair", and (2) cannot apply since in finding the value of services on *quantum meruit* the Court determines the value of the particular services in question and does consider the industry, capacity, training, experience and earning power of the employee, the character of the place where the work is done, the circumstances or surroundings of the employment and the amount commonly paid in the locality for like services, not the amount paid by those who conform to standards set up by the Board—all of which must be ignored in determining the value of the "class of service" rendered.

Plainly those permissive clauses, (1), (2) and (3) of subdivision 8 of Section 551, provides no standard or rule of practical application for determining the value of the "class of service", but the Board is given the arbitrary power to find a wage which it deems "fairly and reasonably commensurate with the value of the service or *class*

of service" and its determination is not reviewable, for Section 563 provides that "there shall be no appeal from the decision of the commissioner or the director on any such question of fact" but only a right of review "as provided in article three of the labor law from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director" (*supra*, p. 5).

"As provided in article three of the labor law" obviously refers to the method of review not to the questions to be reviewed, which are questions of law "included or embodied in any decision or order of the commissioner or director".

As this Court said in the case of *Wichita Railroad & Light Co.* v. *Public Utilities Commission* (260 U. S. 48, 59):

> "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

The fact brief of the Attorney General of New York (pp. 88-145) shows the complexity and difficulty of the problem of standardizing wages and the variety of the factors involved. Attempts at standardization have been made by particular industrial companies. Arbitration boards have adjusted wages for groups. In such cases there is opportunity for compromise and for the adjustment of differences, and the matter is finally settled by agreement. Here a board is empowered to impose a standard not for one employer or one group of employees but for all employees in an industry, and in the last analysis

any such standard is bound to be merely a compromise of individual opinion. That may be done in countries whose laws are not subject to our constitutional limitations. Such laws, notably those of Great Britain, recognize the fact that the establishment of standards must necessarily be a matter of compromise, not the result of applying rules.

Under our system of government such matters must be left to the agreement of the parties.

Even if the matter were capable of determination by rule, no rule of practical application has been prescribed by the New York statute to determine the value of a "class of service." It is left to the absolute discretion of the Board to determine what of the great variety of factors involved, many of which are referred to in the fact brief, shall be taken into account and what importance each shall have. The complexity of the problem is shown by the quotations from the publication on the work of the National Council on Industrial Relations for the Electrical Construction Industry on page 104 of the fact brief:

> "A review of these 33 decisions reveals the Council struggling to set up new standards of procedure in the midst of the general welter of instinctive conduct * * *.
>
> "Wage scales are adjusted, in so far as possible, in accord with the principles enunciated in the agreed policies * * *."

And on page 106:

> "The Council is under a clear obligation to rest its decision on a sound principle; although it cannot always avoid some degree of compromise; but compromise is tolerated, not accepted as a principle in conciliation."

The comparative emphasis to be put upon the job and the skill, capacity, training, industry and experience of the

employee is manifestly a matter for compromise and agreement. It is not a subject for the arbitrary decision of any board, and of course under the challenged statute, as we have already seen, no consideration whatever can be given to the skill, experience, training, capacity and industry of the worker or to the quality and nature of the particular work done, the conditions of the place of work and the circumstances and surroundings of the employment. As stated in the quotation on page 83 of the fact brief, "A spirit of mutual confidence and faith based on square dealing between employees and management is essential to maximum satisfaction from all standards." Yet the statute undertakes to substitute for "mutual confidence and faith based on square dealing" the arbitrary decision of a Board which can take no account whatsoever of facts that are absolutely essential to square dealing.

Section 555, subdivision 4, says that "within sixty days of its organization a wage board *shall* submit a report", etc.

Subdivision 5 provides that "a wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appropriate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality."

Subdivision 6 says that "a wage board may recommend a suitable scale of rates for learners and apprentices in any occupation or occupations, which scale of learners' and apprentices' rates may be less than the regular minimum fair wage rates recommended for experienced women or minor workers in such occupation or occupations."

Section 556 provides that if the report is accepted the Commissioner may make regulations to implement the re-

port and to safeguard the minimum fair wage standards to be established.

Said subdivision 4, of Section 555 is mandatory. Subdivisions 5 and 6, immediately following, are plainly permissive. They were so construed by the Board and the Commissioner of Labor in the instant case.

The Attorney General of New York annexed to his brief in the Court of Appeals the mandatory order and the regulations governing women and minors in laundry occupations. He has omitted them from his brief in this Court. We have supplied the omission by appending a copy as an appendix to our brief.

It will be observed that one rate is prescribed for all who work in a laundry within the New York City area and another for all who work in a laundry anywhere else in the state outside the New York City area, and that the regulations require the same minimum to be paid to all, including learners, apprentices and minors, the only variation authorized being by special permit in the single case of impairment of earning capacity.

Of course we are not concerned with what has been done so much as with what may be done under the statute, but what has been done is plainly permitted by the statute and demonstrates the arbitrary power conferred on the Board and the Commissioner.

Everyone knows that the conditions, circumstances and surroundings of different laundries vary greatly. Everyone knows that the work in different laundries varies greatly. Fine work is done in some, plain work in others. The care, skill and experience required of the worker varies with the character and type of work. The charges that laundries are able to make for their work varies with the place, the type and the quality of the work done. Some employers may be able to comply with the standard imposed; others may not. The Board is not required to give heed to such considerations and it is manifest that it would have been wholly impracticable to do so even if the statute had required it.

The Attorney General of New York says that though the language of the statute is permissive the courts have construed such language to be mandatory, citing *Dunham* v. *Ottinger,* 243 N. Y. 423.

In that case the statute empowered the Attorney General to prosecute a certain class of cases. Of course it imposed a duty. The duty imposed in the instant case was the duty of the Board to report its recommendations as to minimum fair wage standards. The statute said it "*shall* submit a report", etc. Immediately following are the clauses saying what the Board *may* do, obviously leaving the matter entirely to its discretion. But the permissive clauses, even if mandatory, take no account whatever of the skill, capacity and [illegible]y of the employee, the character of the place or the conditions or surroundings of the employment.

Judge Lehman, who wrote the dissenting opinion in the Court of Appeals, considered those clauses as permissive, but thought they became mandatory where the failure to exercise the permissive right would be unreasonable and that in that regard the judgment of the Board was subject to judicial review (Appendix, p. 80). But the statute permits a review only of questions "of law included or embodied in any decision or order of the commissioner or the director" (Sec. 563, p. 5, *supra*). We are dealing with the validity of a statute which plainly gives the board discretion in the matter.

The fact brief of the Attorney General of New York contains the explanation by the Board of its determination. The Board fixed the minimum "at as high a figure as", it thought, "under present conditions can be effectively maintained" in the hope that it might be able to do better later on (Fact Brief, p. 68). The Board started out with moderation, but it found itself utterly unable to observe any standard prescribed by the statute and it frankly admitted that it made no attempt to do so. It decided what

the industry could bear, but we have not come to such a pass in this country yet that our liberties are to be subjected to such power, however moderately it may be exercised by administrative boards at a given time. The Board's statement shows the impossibility of following any standard or rule and the practical necessity of arriving at conclusion by a compromise of individual opinion.

(2) THE SCOPE OF ADKINS v. THE CHILDREN'S HOSPITAL (261 U. S. 525).

The Attorney General of New York says that the Court of Appeals misconstrued the statute, that its construction was a "basic misconception" (Brief, p. 10).

The Court said:

> "This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both" (Appendix, p. 60).

That construction is controlling.

> *Hicklin* v. *Coney*, 290 U. S. 169, 172.
> *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32.
> *Tioga R. R.* v. *Blossburg & Corning R. R.*, 20 Wall. 137, 143.
> *McKeen* v. *Delaney's Lessee*, 5 Cranch. 22, 32.

We have shown under the preceding subdivision that the standard of "value of the service or class of service rendered" possesses the infirmities of the living wage stand-

ard considered in the *Adkins* case and that whilst superficially the language of subdivision 8 of Section 551 may appear to have some relation to the service performed, upon analysis it is found to have no substantial "causal connection" with the business, the contract of employment, or the work done by the employee.

We shall not venture to tell this Court how to construe its own decisions, but we have understood and we believe the bench and bar throughout the country have understood that the *Adkins* case decided a much more fundamental question than that of the standard involved, namely, the constitutional validity of an act thus described by Mr. Justice Sutherland speaking for a majority of the Court:

> "It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee" (*Id.*, pp. 554, 555).

The cases sustaining certain interference with the liberty of contract were classified, considered separately and thus generally distinguished:

> "In none of the statutes thus sustained, was the liberty of employer or employee to fix the amount of wages the one was willing to pay and the other willing to receive interfered with" (*Id.*, p. 547).

And the final conclusion of the Court was thus stated:

> "Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage" (*Id.*, p. 560).

The decision in the *Adkins* case was twice reaffirmed by this Court.

> *Murphy* v. *Sardell*, 269 U. S. 530.
> *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.

The *Murphy* case involved the validity of an act of the Legislature of the State of Arizona passed on February 13, 1923, amending Sections 1 and 2 of Chapter 38 (H. B. No. 3) of the Session Laws of the Third Legislature of the State of Arizona, 1917, prohibiting the employment of females in certain occupations at less than $16 per week and declaring a lesser amount to be "inadequate to supply the necessary cost of living to any such female, to maintain her health, and to provide her with the common necessaries of life."

Mr. Justice Holmes, who dissented in the *Adkins* case, noted his concurrence in that case on the ground that he regarded himself bound by the decision in the *Adkins* case.

The *Donham* case involved the validity of an act of the Legislature of the State of Arkansas passed in 1915, as amended in 1919 and 1921 (Crawford and Moses' Digest of the Statutes of Arkansas, Sections 7102 to 7114), prohibiting the employment of any female worker in certain establishments at less than a stated minimum per day. The act also provided by Section 10 (*Id.*, 7111) that the Commission, if it found after an investigation that a lower minimum was adequate "to supply a woman, or minor female worker * * * the necessary cost of proper living,

and to maintain the health and welfare of such woman, or minor female workers," or if it found that the minimum set was inadequate for that purpose, could, after a public hearing and an opportunity to interested employers and employees to be heard, "issue an order establishing a minimum wage rate that in their judgment is reasonable". In other words, the legislature fixed the minimum wage without saying on what standard it was based, the Commission was then to be set in motion by a finding that the prescribed rate was more than adequate or inadequate under the living standard, as the case might be, but were thereafter to be governed in fixing a different rate by the rule of reasonableness. The entire Court concurred in holding both of those statutes unconstitutional on the authority of the *Adkins* case, except Mr. Justice Brandeis who dissented in each.

The late Chief Justice Taft, who dissented in the *Adkins* case, cited it for the fundamental proposition involved in his judgment in *Wolff Co.* v. *Court of Industrial Relations* (262 U. S. 522, 534). The point decided in that case is thus stated in the concluding paragraph of the Court's judgment (*Id.*, p. 544):

> "We think the Industrial Court Act, in so far as it permits the fixing of wages in plaintiff-in-error's packing house, is in conflict with the 14th Amendment, and deprives it of its property and liberty of contract without due process of law."

Chief Justice Hughes cited it with other cases in *Near* v. *Minnesota* (283 U. S. 697, 707-708) for the broad proposition thus stated:

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States*, 157 U. S. 161, 165), this court has

> held that the power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The petitioner appears to find comfort in this sentence in Mr. Justice Sutherland's opinion in the *Adkins* case:

> "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable" (*Id.*, p. 559).

But we are not dealing with such a statute, however understandable it might be, and it is unnecessary to consider whether a statute would be constitutional which enabled the employee to recover the reasonable value of her services despite an agreement for a lesser sum. In such case the Court would consider the relevant factors which, as we have shown under subdivision (1), are necessarily excluded from the consideration of the Board in determining the value of the service or "class of service". We are concerned here with the establishment of standards by a Wage Board which need have little or no relation to the value of the particular service rendered. To say that such a standard is based on *quantum meruit* is to ignore the essentials of *quantum meruit*.

As in the *Adkins* case the challenged act "is not a law dealing with any business charged with a public interest or with public work or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe the hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, * * *" (*Adkins* case, p. 554).

The decisions subsequent to the Adkins case cited by the Attorney General (*Nebbia* v. *New York*, 291 U. S. 502 and *O'Gorman and Young* v. *Hartford Ins. Co.*, 282 U. S. 251) fall under the exceptions considered in the *Adkins* case.

(3) THE ALLEGED CHANGE IN CONDITIONS.

The suggestion that there has been a change in conditions to warrant a departure now from the *Adkins* case is fanciful. We have had a depression, but the challenged Act is not an emergency statute. The Legislature of New York did pass a companion Act at the same time, known as the Desmond Act, which was applicable to both men and women and was called an emergency measure, but the Governor vetoed it because of doubts of its constitutional validity. So far from justifying a minimum wage law, a depression makes such a law the more harmful and oppressive by increasing the difficulty of the least efficient in securing employment. But the statute is not an emergency statute. There is nothing new in the alleged inequality of bargaining power and there is nothing peculiar to women in it; indeed the breadwinner of the family, usually a man, is under as great compulsion to secure employment as women, certainly under greater compulsion than those women who seek employment to eke out other means of income or support. The inequality of bargaining power was recognized by this Court as far back as *Holden* v. *Hardy* (169 U. S. 366, 397), sustaining a health measure.

The fact brief submitted by the Attorney General of New York indicates an increase in the number of women employed in industry, but of course there are still a great many more necessitous men than women so employed. The fact adverted to would appear to indicate an improvement in the status of women in industry and it would appear by the chart opposite page 30 that the wages of women were much less seriously affected by the depression than the wages of men. There is some statistical material in the

fact brief with respect to the employment of women and children in industry in New York state which was not before the Court in the *Adkins* case, but nothing new is added to the 1106 page—2 volume fact brief of Mr. Frankfurter in the *Adkins* case.

A social philosophy in conflict with the fundamental principles of the American Constitution has doubtless gained many adherents since the decision of this Court in the *Adkins* case, but every argument that can be presented in favor of minimum wage legislation was heard and considered in the *Adkins* case.

(4) THE INTERFERENCE WITH FUNDAMENTAL RIGHTS REGARDLESS OF STANDARD.

The question is not whether the States or the Federal government ought to exercise such a guardianship. It is prohibited in the one case by the Fourteenth Amendment and in the other by the Fifth Amendment. The Attorney General of New York appears to think that inequality in bargaining power has developed since the decision in the *Adkins* case, but few bargains have ever been made between parties of exactly equal bargaining power, and undoubtedly that is especially true in the case of contracts of employment. Adam Smith considered the disparity in bargaining power between employee and employer in his "Wealth of Nations" in 1776.*

To overcome that inequality the law favors and zealously safeguards the right of collective bargaining. That inequality justifies statutes to prevent fraud and overreaching, such as the statute requiring coal to be weighed before screening (*McLean* v. *Arkansas*, 211 U. S. 539); requiring the redemption in cash of store orders issued in payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13);

*"Wealth of Nations", London, 1776, Book I, Ch. 8, page 30 of McCulloch's Edition.

regulating the time of payment of wages in certain specified industries (*Erie R. R. Co.* v. *Williams*, 233 U. S. 685); and the like. But all of that is very far from the establishment by a State agency of a standard of wages, whether minimum or maximum, for an industry.

It has been claimed that freedom of contract is illusory and it has even been denied that it is protected by the Fifth and Fourteenth Amendments. But this Court has always considered it not only as a constitutional right but as a natural right, as one of the inalienable rights with which man was endowed by his Creator.

As said by Mr. Justice Field in *Butchers' Union Co.* v. *Crescent City Co.* (111 U. S. 746, 757)—"Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment"; by Mr. Justice Peckham in *Allgeyer* v. *Louisiana* (165 U. S. 578, 589)—"but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned"; by Mr. Justice Harlan in *Adair* v. *United States* (208 U. S. 161, 174)—"While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal

services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it"; by Mr. Justice Pitney in *Coppage* v. *Kansas* (236 U. S. 1, 14)—"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contract is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money";—by Mr. Justice Pitney in *Prudential Insurance Co.* v. *Cheek* (259 U. S. 530, 536)—"That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question"; by Mr. Justice, now Chief Justice Hughes in *Truax* v. *Raich* (239 U. S. 33, 41)—"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure"; by Mr. Justice McReynolds in *Meyer* v. *Nebraska* (262 U. S. 390, 399-400)—"The established doctrine is that this liberty may not be interfered with, under the guise of protecting

the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts."

In *Wolff Co.* v. *Industrial Court* (262 U. S. 522, 534) the late Chief Justice Taft, speaking for the Court, in relation to a compulsory arbitration act, said:

> "It curtails the right of the employer, on the one hand, and of the employee, on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment."

We have already discussed the *Adkins* case. Since it appears to be the last word spoken by this Court on the subject and is so apposite and forceful we repeat the quotation from what Chief Justice Hughes said in *Near* v. *Minnesota* (283 U. S. 697, 707-708):

> "So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie* v. *United States,* 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The Attorney General of New York cites three cases which he says approved wage fixing statutes:

> *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251.
> *Bunting* v. *Oregon,* 243 U. S. 426.
> *Holcombe* v. *Creamer,* 231 Mass. 99.

The *O'Gorman & Young* case, though subsequent to the *Adkins* case, falls within one of the exceptions considered in that case, i. e., a business affected with a public interest.

Bunting v. *Oregon* was distinguished by Mr. Justice Sutherland as having been decided as an hours not as a wages statute in accordance with the contention made by the learned counsel for the State in that case.

In *Holcombe* v. *Creamer* the decision was put upon the express ground that the statute was not mandatory and decision was reserved on the question whether "a mandatory minimum wage law would violate the provisions" of the constitution of Massachusetts.

It may have been a work of supererogation to quote at such length from the decisions of this Court on a question which it has repeatedly said was settled law, but the truth is that the proponents of this class of legislation have a social philosophy which is opposed to the constitutional guarantees adopted to promote the general welfare. They can not be nullified because some now think they are detrimental to the general welfare. They protect all capable of contracting. The proponents of minimum wage legislation would withdraw that protection from some on the theory that they will be better off without it and that that indirectly will promote the public welfare. But that in effect would nullify the constitutional guarantee, as this Court held in *Coppage* v. *Kansas* (236 U. S. 1, 18).

That case involved the validity of a statute declaring it a misdemeanor, punishable by fine or imprisonment, for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of the employment. Whilst there might be differences of opinion as to whether the end sought by the statute in question, i. e., the protection of a legal right, was within the police power, we submit that the fixing by the State of the price at which one person shall be permitted to render services for another on the ground that

that will be for the public good amounts to a nullification of the constitutional guarantee.

The Fourteenth Amendment is a limitation of the police power and that power cannot be so exercised as to destroy the limitation.

As said by Chief Justice Hughes in *Home Building & Loan Association* v. *Blaisdell* (290 U. S. 398, 439):

> "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

That case involved a "temporary and conditional restraint where vital public interests would otherwise suffer", in a situation produced by an economic disaster, which Chief Justice Hughes likened to fire, flood or earthquake.

The instant case involves the destruction as a permanent policy of the right of parties under no disability freely to contract, the one to render services and the other to pay therefor, except on terms prescribed by an administrative agency.

We say that the direct end sought is private benefit and that the supposed public benefit is at most indirect. We are not now dealing with disasters from either economic or physical causes in which the public interest in whatever happens may become direct and vital. We are dealing solely with the destruction of the right of two parties to agree on the price for which one shall work for the other for the supposed immediate and direct benefit of

one. But the constitutional guarantees cannot be stricken down for the benefit of individuals or groups on the theory that that will ultimately benefit the public.

The framers of the Constitution, of the Bill of Rights and of the 14th Amendment thought it would promote the general welfare to stimulate individual initiative and enterprise and to encourage self-respect and self-reliance. The proponents of minimum wage and similar legislation have a different social philosophy. They think the general welfare will be promoted by striking down the constitutional guarantees and by extending the guardianship of the State over the citizen. Whether they are right or not is for the people, not for the courts, to decide. Experience of a century and a half under what we call the American system, as contrasted with that of all other nations, should strengthen our faith in a system designed to promote individual initiative and independence, to stimulate self-respect and self-reliance and to maintain equal opportunity for all.

(5) THE ENDS SOUGHT ARE THE SAME AS IN PREVIOUS PRICE-FIXING SCHEMES FOR LABOR.

The question before the Court is whether the end sought is within the police power and if so whether the means adopted is appropriate to that end, for no one claims that liberty of contract is absolute.

The Attorney General of New York says that the end sought is (1) the assurance of a fair wage, and (2) the elimination of sources of unfair competition, and apparently also (3) the maintenance of the health of women in industry (Brief, pp. 17-22). None of them furnish any basis for discrimination between men and women. Doubtless the well-being of every individual and of every group indirectly affects all, but the indirect public interest in the wages paid the workers is greatest in the case of wages paid men. Men, as a rule, are the heads of the families, the

breadwinners. Many more men than women are employed in industry. Inequality of bargaining power between employer and employee is not peculiar to women employees; indeed the pressure upon the breadwinner is the greatest. This has been the subject of consideration by economists, publicists and reformers (the latter term is used in its best sense) since long before the adoption of the American Constitution, and under the system established by it the condition of the workers, both men and women, is incomparably better than that of the workers anywhere else in the world.

The so-called "chiseler" who pays low wages and is thus able to undersell his competitor has long been in disfavor, but the "chiseler's" main advantage results from low wages paid to men. Enlightenment and the pressure of public opinion are gradually removing that so-called source of unfair competition, but the suggestion that it is competent for the State to fix the price which every employer shall pay to his employees indirectly to prevent some employers from underselling their competitors serves to emphasize the point that the so-called public interest claimed to be promoted is wholly indirect.

This Court has many times said that "evils are to be suppressed or prevented by legislation which comports with the Constitution".

See

Tyson & Bro. v. *Banton*, 273 U. S. 418, 442.

The liberties of all are not to be destroyed because of the sins of some.

The claim still made that this is a health measure also emphasizes our point. This Court has three times rejected that claim. (*Adkins* v. *Children's Hospital*, 261 U. S. 525, *Murphy* v. *Sardell*, 269 U. S. 530, *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.) If it were a health measure, the wages paid to heads of families would most certainly be the first thing to be regulated. There is basis

for saying that excessive hours of labor and night work for women directly affect the health of the worker and therefore hours and night work statutes, whether wise or unwise, were within the competence of the legislatures, though thousands of women were deprived of comfortable jobs under healthful surroundings by the night statutes; but the wages paid only indirectly at most affect the health of the recipients, as this Court necessarily decided in the cases just cited.

The physical differences between men and women may furnish reason for discrimination between them, both as to night statutes and as to hours statutes, but the alleged differences in bargaining power are more illusory even than the right of freedom of contract is said by some to be and are wholly irrelevant to the question before the Court. It is said that the statistics show that the wages paid women are on the whole less than the wages paid men for similar work. Undoubtedly that is one of the reasons for the alleged increase in the number of women employed in industry. It might solve the unemployment problem as far as men are concerned by requiring equal pay for men and women, but that would furnish little consolation to women deprived of the right and the opportunity to work for a wage which they were glad to receive. It is said that men are better organized than women, but women may organize the same as men. It is said that the garment workers receive higher wages than the laundry workers because they are better organized. That merely indicates that the women are learning the advantages of collective bargaining. It is said that women are willing to work for less than men to supplement income from other sources. We say that that is their right, protected by the Constitution, and that it is not for the State under the Constitution, as it now exists, to deny them that right on the theory that that may indirectly affect others. Although the proponents of this legislation—and practically all of the material in the fact brief comes from them—

assert the contrary, the fact is that the inevitable tendency of establishing minimum wages is to lower the maximum if the minimum is high enough to be effective and to displace women with men workers wherever men can be employed at comparable rates.

Whether it is better for society on the whole to adopt leveling processes and to take away the incentive to and the reward for industry and skill may be a subject for debate in the political forum. The question before the Court is whether constitutional guarantees may be stricken down to produce that result.

The direct object of the act is the fixing of wages for a group because of alleged inequalities in bargaining power. The language of this Court in the *Coppage* case is precisely apposite (*Id.*, pp. 17-18):

> "But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law', gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.
>
> "And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

The general concern of society for the welfare of its constituent members or of any group of such members is

not what is meant by the public interest which will justify an invasion of personal liberty under the police power. If it were, there would be no restraint or limitation whatsoever upon the law-making body except its own moderation, for it would always be for it to determine whether the public interest was sufficient to justify any proposed action. Of course the public is greatly concerned with the welfare of the workers, but it has no direct interest in the wages paid by A to B and a law prescribing the wages so as to be paid does not directly affect any public interest justifying the exercise of the police power. The end or object directly effected by such a law is private. The public interest, however great, is indirect. Unless that distinction be maintained, all constitutional limitations may be destroyed by the exercise of the police power in the sole judgment and discretion of the law-making body.

PART II.

Fundamental principles of valid legislative price-fixing are decisive in this case.

1. RULES GOVERNING PRICE-FIXING.

Minimum wage laws for women have three times been held unconstitutional by this Court in cases in which all aspects of minimum wage legislation were presented.

Adkins v. *Children's Hospital*, 261 U. S. 525.
Murphy v. *Sardell*, 269 U. S. 530.
Donham v. *West-Nelson Mfg. Co.*, 273 U. S. 657.

In *Adkins* v. *Children's Hospital*, supra, all state minimum wage laws in existence at that time were before the Court, and in *Murphy* v. *Sardell*, supra, many states having minimum wage laws intervened as amici curiae.

In no particular, material to the fundamental constitutional question, does the New York minimum wage law now before the court differ from the wage laws heretofore considered and passed on by the Court. All relate to the bargain between employer and employee and permit, either through direct legislative action or through a board or commission, the fixing by law of wages which an employee may receive or an employer may pay in the bargain between themselves, and they do not concern, regulate, or fix prices exacted from the public, either for property or services. All are alike in directly providing, with the force of law, the amount of money that A shall pay to B when they occupy to each other the position of employer and employee.

It is as to this uniform feature of all compulsory minimum wage laws that this Court, in interpreting the guarantee of liberty in the Fifth and Fourteenth Amendments, has uniformly and without exception, found that "the power of the State stops short of interference with what are deemed to be certain *indispensable requirements of the liberty* assured" by those Amendments. (Italics ours.) (*Near* v. *Minnesota*, 283 U. S. 697, 707-708.)

The decision in the *Adkins case*, and the decisions in the other cases dealing with similar wage-fixing laws which followed it, were based upon fundamental principles. They were concerned with the determination of what is meant by the "liberty" in the Constitution which may not be taken without due process of law and which may not be taken even upon the payment of just compensation. They rested upon the accepted and settled understanding of the "indispensable requirements" of that liberty, recognized and emphasized, not alone in those cases, but in a long line of decisions on the subject, marking the wide distinction, in the exercise of the "rate-making power" between fixing the rates which must be paid by the public and fixing the wages, not paid by the public, but agreed on in the purely private bargain which two persons, one desiring to work in the

ordinary occupations of the community and the other wishing such services in that occupation would be free to agree upon between themselves, but for legislative restraint.

In the many cases which have dealt with this subject of the "rate-making power", that is price-fixing or rate-fixing by law, from the earliest times to the present—whatever may be the twilight zone in which there may be doubt or debate,—there has consistently, and on fundamental grounds, been maintained the clearly marked constitutional difference between the rates or charges made to the public, on the one hand, and the rates or charges called wages, not made to the public, on the other hand.

This may be demonstrated by a consideration of the principles which run through all cases in this Court on the subject of the "rate-making" element of the Police Power.

A—*Freedom from price-fixing is the rule and not the exception.* This aspect of the exercise of the Police Power has been constantly emphasized in every expression on the subject by this Court from the earliest to the latest.

In *Patterson* v. *Bark Eudora*, 190 U. S. 169, Mr. Justice Brewer laid down the "proposition" that,

> "Generally speaking, every citizen has a right freely to contract for the *price* of his labor, services or property" (p. 174).

In an elaborate discussion of the subject in *Ribnik* v. *McBride*, 277 U. S. 350, this Court said (p. 357):

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, the *fixing of prices* for food or clothing, of house rental, or of wages to be paid, whether minimum or maximum, is beyond the legislative power." (Italics ours.)

And with special reference to the liberty of the individual in the relation of employer and employee, Mr. Justice Harlan, speaking for the Court, in *Adair* v. *United States*, 208 U. S. 161, said in even more emphatic terms:

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. * * * In all such particulars the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land" (pp. 174-175).

B—*The desirability of price-fixing as a speedy remedy for supposed evils, and the difficulty of dealing with them by other methods, constitute no warrant for this interference with the "freedom of contract."*

In the case of *Hurtado* v. *California*, 110 U. S. 516, Mr. Justice Matthews used the following language, referring to the powers of the States under the Constitution:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint * * * (p. 535).
>
> " 'It must be conceded', said this court, speaking by Mr. Justice Miller in *Loan Assn.* v. *Topeka*, 20 Wall. 655-662, 'that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlim-

ited control of even the most democratic depository of power, is after all but a despotism' " (p. 536).

In *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 37, Chief Justice Taft, delivering the opinion of the Court on the question of the constitutionality of the Child Labor Law, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

Mr. Justice Holmes, in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 394, referring to the protection of private property in the Fifth Amendment, said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States * * * (p. 415).
>
> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (p. 416).

And more recently, referring particularly to price-fixing for personal services, this Court said (*Tyson & Bro.* v. *Banton*, 273 U. S. 418, 445):

> "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods

precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by law-makers or judges to save exceptional cases of inconvenience, hardship or injustice."

And, again, *Ribnik* v. *McBride* (277 U. S. 350, 358):

"And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on.'

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided."

C—*Rate-making, being a taking of property for supposed public benefit, must comply with the requirements of just compensation.*

This has been expressed in numerous cases, but a few will illustrate the view of this Court.

In *Cotting* v. *Kansas City*, 183 U. S. 79, 91, the court said:

> "As to parties engaged in performing a public service, while the power to regulate has been sustained, negatively the Court has held that the legislature may not prescribe rates which, if in force, would amount to a confiscation of property."

In *Smyth* v. *Ames*, 169 U. S. 466, it was said (p. 547):

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

In *Board* v. *N. Y. Telephone Co.*, 271 U. S. 23, it was said (p. 31):

> "The just compensation safe-guarded * * * is a reasonable return on the value of the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory."

In *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662, 671, it was said:

> "The established principle is that as the due process clauses (Amendments V and XIV) safeguard private property against a taking for public use without just compensation, neither Nation nor State may require the use of privately owned property without just compensation. When the property itself is taken by the exertion of the power of eminent domain, just compensation is its value at the time of the taking. So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value."

D—*Price-fixing is justified only as a protection to the consuming and using public and the price regulated is the price paid by the public.*

When we speak of constitutional regulation of business by the fixing of prices charged because the business is "devoted to a public use", "affected with a public interest" or even of such a nature that "unrestricted competition is an inadequate safe-guard to the public" we are referring to the charges made to those who patronize the business, that is, the buying public. The protection of the public is required, and hence justified, because growing out of the relation of the business to the public, there is a tendency to or danger of monopoly, or there may be an undue and unintended advantage gained by the public grant, or there may be danger to the public in securing its supply, in unrestricted competition in a particular instance.

The charge to which we refer and the fixing of which is the method of protecting the public, is manifestly the charge made to the public, not the division between the partners, distribution among the stockholders, or the payments in the course of internal management of the business, or the production of goods or services which are sold to the public.

The very reasoning, therefore, which supports price-fixing, in the case of any public service in which the public is interested to such an extent as to require regulation of that particular kind, negatives the fixing of wages of employees in the bargain to which employer and employee alone are parties and to which bargain none of the criteria justifying rate-making can be applied.

In other words, if the business of conducting a grain elevator is to be considered as so far affected with a public interest or so affecting the public welfare that it may be regulated as to prices charged to and paid by the public, such a business cannot, by the same token, be regulated

to the extent of fixing the prices to be paid to the carpenter for putting up the building or the employee who shovels out the grain, persons who make no charge to the public for their services, but look solely to their employer, the only other party to the bargain. The two are obviously different in the constitutional sense; the one activity—allowing the use of the elevator to all who may wish to use it for a charge—is a public business in the sense that it is a business in direct relation with the public, in which the public has direct concern; the other is a private matter with which the public has no direct relation and cannot be directly affected or concerned.

This distinction is illustrated in a number of cases. Three may be mentioned.

In the case of *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251, the fixing of the amount to be charged by insurance agents was upheld because it was but a part of the charge made to the public for the insurance, the insurance business being so far affected with a public interest that the rates could be fixed by law. It was not intimated in the majority opinion in that case that there was a right to regulate the wages and salaries of the employees of the insurance company as between the company and its employees having no direct dealings with the public.

In *Nebbia* v. *New York*, 291 U. S. 502, the Court sustained "price fixing" in the sale of milk to the public, but it was not intimated in that case that the milk dealer could have fixed for him by public authority the wages which he paid an employee in his store or that the employee might have fixed for him by law the amount he might charge his employer for his labor.

The basis of the court's decision is indicated in the following (p. 538):

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate

safeguard of the *consumer's interest,* produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry *and to the consuming public.*" (Italics ours.)

From this it will be seen that the Court was dealing and meant to deal only with the relation of the business to the consuming public. Indeed, this is made even clearer by the reference in the *Nebbia case* to the decision in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, where the very distinction here pointed out was made and where the Court suggested that assuming that the business of preparing food could be said to be affected with a public interest there was no justification for fixing the wages of its employees.

And, in *Tagg Brothers* v. *United States,* 280 U. S. 420, the Court, while pointing out that the fixing of the charges that should be made by a business affected with a public interest could not be avoided by splitting the charge up between the charge to the public for the use of the stockyard and a separate charge to the public for the commission men using the same property "affected with a public interest", and engaged in an integral part of the same business, recognized the distinction here made by saying *"There is here no attempt to fix anyone's wages."*

2. THE BASIS FOR THE DISTINCTION BETWEEN WAGES OF EMPLOYEES AND RATES FOR THE USE OF PROPERTY IN CONSTITUTIONAL PRICE FIXING.

The results reached in these cases and in many others on this subject, are uniformly consistent with the vital dis-

tinction between property and labor in the manner of constitutional price-fixing; one is the taking of "property", the other is a taking of "liberty", both mentioned in the Constitution, and both protected by the constitutional guaranties, as rights; but the right of property and the right to liberty are essentially different in their nature and in the relation of the state to them. Property, however absolute and unqualified may be the title to it, originates from the state, and is held under the implied condition that its use shall not be injurious to an equal enjoyment by others having an equal right (*Holden* v. *Hardy*, 169 U. S. 366, 392, quoting Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush. 84).

In a sense, property is thus held at the will of the state and may revert to the state or even be taken by the state if the public need requires. But liberty is not held at the will of the state. It does not revert to the state, and it can not be taken by the state except as a punishment for crime or in time of war. The right of property is a conditioned right, but the right to liberty is a prerequisite to the very organization of a government such as ours. To secure it was the purpose of the organization of the government, and nothing is better settled in our constitutional law than that liberty does not mean merely freedom from physical restraint, but it includes the right to work for a living by using the powers of brain and muscle in the ordinary activities of mankind.

"It requires no argument", said Mr. Justice Hughes, in *Truax* v. *Raich*, 239 U. S. 33, 41, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure."

Another attribute of property, not pertaining to liberty, is that property always has its equivalent in money or other thing of value. When property is taken for public

use, either by taking the property directly or by taking indirectly by diminishing the income from the property, this equivalent may always be given in return, and the constitutional requirement of "compensation" complied with. When the use of *property* is regulated by price fixing, the method by which this equivalent is secured has been carefully worked out in our system of government; we ascertain the fair value of the property devoted to the public use and allow an adequate return on this value, and thus avoid confiscation.

But liberty has no constitutional "equivalent in money", under our system of government.

So, when salaries or wages are fixed by law, there is no way to ascertain the capital investment and the adequate return. When a man devotes his brain and brawn to the earning of a livelihood, how is the Court to calculate a rate of return on the investment when nothing is invested which may be measured in dollars and cents? How can the Court fix six per cent. on brain power or six per cent. on the sweat of the brow and thus determine that there has been an adequate return, and hence no confiscation?

So, when the use of *property* is regulated by rate-making, the constitutional guaranty that property shall not be taken without just compensation may be fulfilled; but when wages are regulated by price-fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

It follows from these differences that, just as property may be taken for public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such a way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, labor or personal services *can not* be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether

the characterization of "public use" is by judicial reasoning or legislative declaration. This would be "running the public interest argument into the ground", as said by this Court in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539, using the expression of Mr. Justice Bradley in the *Civil Rights Cases*, 109 U. S. 3, 24.

This thought, that working for wages can not be, in the very nature of things, said to be a business devoted to a public use, has been several times expressed by this Court. In *Ribnik* v. *McBride*, 277 U. S. 350, this Court reaffirmed its previous statement in *Wolff* v. *Industrial Court*, supra:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation * * * (p. 356).
>
> "The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' *which the law contemplates as the basis for legislative price control*" (p. 357). (Italics ours.)

Again, in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539, 540:

> "If, as, in effect, contended by counsel for the state, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. * * *

> It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

Any basis for legislative price control or the exercise of the rate making power, is wholly absent in the case of the relation of employer and employee between themselves, and not with the public—wherever the labor may be performed, in connection with whatever business it may be given, and regardless of the public interest.

The differences between "property" and "liberty" are expressly recognized in the Constitution itself. "Property" may be taken upon the payment of "just compensation". Liberty, including work for wages, in the relation of employee to the employer can not be taken at all, except by the due process of determining the commission of a crime for which punishment is provided.

These essential constitutional differences between "property" and "labor" in respect of their liability to or immunity from "price fixing" is not new or startling. It underlies all the decisions of this Court on the subject of the rate-making power. It determines the result in every case, and so it is that while regulation of the use of property by price fixing has always been sustained where (a) the property was devoted to a public use in which the public had an interest, because of direct dealings with the owner, and (b) "just compensation" in some form could be conceived, regulation of wages by price fixing has always been denied, whatever may have been the public interest, and whatever the reasonableness of the price fixed. (The fixing of fees as a condition to the granting of a bounty by the state and the stipulation of wages as a condition of work for the state are, of course, not really exceptions, but rather affirmances of the rule.)

3. REVIEW OF CASES ILLUSTRATING AND APPLYING THE DISTINCTION.

A review of the leading cases in this Court on the subject now under consideration will show that these distinctions are consistent with the conclusion in every single case, without exception.

Frisbie v. *United States,* 157 U. S. 160. (Regulation of Congress forbidding attorneys to receive more than a certain amount of prosecuting claims for pensions, held constitutional on the ground that the pension is a bounty, and the terms upon which it may be granted or withheld, are wholly within the discretion of Congress; at the same time affirming the doctrine that except for this right to control bounties from the government, every citizen has the right, free from legislative control, to fix the price for his labor and services.)

Holden v. *Hardy,* 169 U. S. 366. (Statute limiting the employment of workmen in under-ground mines, held constitutional solely on the ground that it was a provision for preserving the public health, the Court disclaiming any intention of holding that regulations not primarily for the public health but primarily to restrict employment, would be constitutional.)

Knoxville Iron Co. v. *Harbison,* 183 U. S. 13. (Regulation requiring the redemption of store orders issued in payment of wages; held constitutional on the ground that it primarily and directly affected the public morals and safety.)

Patterson v. *Bark Eudora,* 190 U. S. 169. (Regulation making it a misdemeanor to pay seamen wages in advance; held constitutional on the ground that it was a measure directly affecting public morals, and as in *Holden* v. *Hardy,* supra, not affecting in any way the amount of the wages.)

Adair v. *United States,* 208 U. S. 161. (Act making it a criminal offense for any railroad company to discharge an employee on the ground that he was a member of a

labor union; held unconstitutional on the ground that it was an interference with the freedom of employer and employee to fix the terms of employment, being related to that term (similar to the amount of wages) which has no direct relation to the health, safety or morals, but is intended to be primarily a restriction upon the terms for the mere purpose of imposing such restrictions.)

Muller v. *Oregon*, 208 U. S. 412. (Statute limiting the hours of labor of women; held constitutional on the ground that it was a public health regulation, and assuming that the interest of the state terminated with the hours of service, and amount of compensation would be left to the agreement of the parties.)

McLean v. *Arkansas*, 211 U. S. 539. (Regulation requiring coal to be measured for payment of miners' wages, before screening; held constitutional on the ground that it was a measure to prevent fraud and requiring honest weights and measures in the transaction of business; but affirming the freedom of the right, under the Fourteenth Amendment, to make contracts for the sale of labor and to carry on trade or business.)

Riley v. *Mass*, 232 U. S. 671. (State statute limiting the hours of labor in factories for women; held constitutional following *Muller* v. *Oregon*, supra.)

Smith v. *Texas*, 233 U. S. 630. (State statute prohibiting any person from acting as conductor on a passenger train without having for two years prior thereto worked as brakeman or conductor of a freight train; held unconstitutional affirming the doctrine that the liberty protected by the Constitution means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use the powers of mind and body in any lawful calling.)

Erie Railroad Co. v. *Williams*, 233 U. S. 685. (State statute requiring semi-monthly payment of wages of employees of certain specified industries, including railroads;

held constitutional as an exercise of police power to protect the public morals and safety, following *Knoxville Iron Co.* v. *Harbison*, supra, and *McLean* v. *Arkansas*, supra.)

Coppage v. *Kansas*, 236 U. S. 1. (State statute making it a misdemeanor for an employer to require an employee not to become a member of a labor union; held unconstitutional as legislative interference with a term of employment which was not directly and primarily for the public health, safety or morals, but affecting the term of the contract for the primary purpose of restricting that term.)

Miller v. *Wilson*, 236 U. S. 373. (Statute fixing maximum hours of labor for female workers; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon*, supra.)

Bosley v. *McLaughlin*, 236 U. S. 385. (Statute limiting the hours of labor for women in certain employments, including hospitals; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon*, supra.)

Truax v. *Raich*, 239 U. S. 33. (Arizona statute regulating the employment of aliens, and requiring that employers should employ not less than 80 per cent. qualified electors or native born citizens; held unconstitutional on the grounds that it was an interference with freedom of employment not directly relating to public health, safety or morals, and affirming the doctrine that the right to work for a living in the common occupations of the community is of the very essence of personal freedom that it was the purpose of the Fourteenth Amendment to secure.)

Wilson v. *New*, 243 U. S. 332. (Act of Congress, the "Adamson Law", requiring that the then existing wage scale should continue in force pending a great public emergency; held constitutional on the ground that the interference with private rights was permitted only when a failure to agree on wages would jeopardize the nation's welfare *and then only as a temporary measure* to meet a passing exigency, leaving the parties free to govern their relations by their own agreements after the specified time;

and affirming the doctrine that, "as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is *not subject to be controlled or prevented by public authority*".)

Bunting v. *Oregon*, 243 U. S. 426. (State law fixing hours of labor; held constitutional solely on the ground that it was an "hours of service" law in the interest of public health, and although some question of overtime pay was presented, the Court disclaimed any intention of holding that a wage fixing statute could be sustained.)

Adams v. *Tanner*, 244 U. S. 590. (State law affecting the fees to be charged by employment agencies; held unconstitutional on the same principles which govern the power to fix wages of employees.)

Adkins v. *Children's Hospital*, 261 U. S. 525. (Act of Congress, applying to the District of Columbia, authorizing the fixing of minimum wages for women in various employments in the District; held unconstitutional on the ground that it was a "wage fixing law, pure and simple", and thus violated the Fifth Amendment, although many of the businesses in which employment was regulated were businesses affected with a public interest, hotels, for example; and, after a review of all the leading authorities, that were cited against the contention that the law was invalid, stating that "in none of the statutes thus sustained was the liberty of employer or employee to *fix the amount* of wages the one was willing to pay and the other willing to receive interfered with.")

Wolff Co. v. *Industrial Court*, 262 U. S. 522. (Kansas statute creating a so-called "Industrial Court" for the purpose of providing compulsory arbitration between employers and employees in business affected with a public interest, and as a result of such arbitration, fixing the wages of employees; held unconstitutional so far as wage fixing was concerned, on the authority, principally, of *Ad-*

kins v. *Children's Hospital,* supra, and affirming the doctrine that "there is no authority of this Court to sustain such exercise of power in respect to those kinds of business affected with a public interest.")

Radice v. *New York,* 264 U. S. 292. (State law prohibiting employment of women in restaurants between the hours of 10 P. M. and 6 A. M.; held constitutional as a health measure; but affirming the doctrine of *Adkins* v. *Children's Hospital* that a wage fixing law would be unconstitutional.)

Murphy v. *Sardell,* 269 U. S. 530. (State law fixing directly minimum wages for women, and declaring the need of such law in the interests of public health and morals, held, in a memorandum opinion, unconstitutional as violative of the Fourteenth Amendment on the authority of *Adkins* v. *Children's Hospital,* supra, which concerned the Fifth Amendment.)

Tyson & Bro. v. *Banton,* 273 U. S. 418. (Certain sections of the New York Ticket Brokers Act declaring that the price for admission to theatres is a matter affected with a public interest, and forbidding resale of tickets by any broker at a price in excess of 50 cents above the price printed on the face of the ticket; held unconstitutional as violative of the Fourteenth Amendment, affirming the principle that price fixing for personal services, such as that of a broker, is not permissible as a general rule; that a declaration of the legislature that business affected with a public interest is not conclusive on the Court; that the admitted power to regulate in many other respects does not lead to the conclusion that regulation by price fixing may also be resorted to, as the exercise of police power generally may be quite distinct from the power to fix prices; and that the provision for fixing prices cannot be sustained merely as a measure of preventing fraud or extortion, and the difficulty or even impossibility of dealing with evils in any other way constitutes no warrant for suppressing them by methods precluded by the Constitution.)

Ribnik v. *McBride*, 277 U. S. 350. (State law requiring a license of and regulating the conduct of employment agencies, including the fixing of prices to be charged for services rendered by such employment agencies; held unconstitutional as violative of the Fourteenth Amendment so far as the price fixing features were concerned; and affirming the doctrine that the common callings could not be said to be "devoted to a public use", or "clothed with a public interest" in the sense "which the law contemplates as the basis for legislative price control"; and affirming that the wages of the butcher, the baker, the wood chopper, and the miner could not be fixed by state regulation, and adding that there is "no reason for applying a different rule in the case of legislation controlling prices to be paid for *services,*" rendered by the employment agency, the real estate broker, or the merchandise broker.)

Tagg Brothers v. *United States*, 280 U. S. 420. (Federal statute, Packers and Stockyards Act, regulating business of buying and selling livestock in interstate commerce at stockyards and authorizing the fixing of rates for the charges of stockyards and market agencies, held constitutional, the Court stating that the mere division of the stockyards services between the stockyards corporation and the market agencies does not deprive Congress of a power of regulation which it otherwise would have had, and that such a regulation was not an attempt to fix wages or limit any one's net income.)

The "liberty" of the citizen, protected in the Bill of Rights, means the right to work for a living in the ordinary occupations and professions, not themselves forbidden as dangerous to the public health, safety, morals or welfare; this right, like all exercises of liberty, must of necessity be restricted as to time, place and circumstance so as to be enjoyed consistently with like measure of right of his fellows making up the body politic; but it can not be valued by the State—no price may be set upon it, and called

or treated as the legal equivalent; and so it can not, like property, be taken, either wholly or partially, for use by the State, upon paying just compensation; for there is no yardstick to gauge either the title to the right, or its use, and the Bill of Rights never contemplated that there should be; only the individual, possessor of the right, may fix its worth, in his bargaining with his fellows having equal rights.

From these decisions therefore there may be deduced the proposition—indeed, for all practical purposes, the rule—which effectively disposes of the question of wage-fixing in all instances and which reconciles the conclusions reached in all cases on the subject, and, also the reasoning by which those conclusions are reached. This simple rule is that the legislative rate-making power extends to the use of property under certain circumstances and conditions; it does *not* extend at all to wages, certainly wages paid by an employer and not by the public (excluding of course, fees for securing bounty from the government, work for the government itself, and stipulations as to fees and wages in government contracts). The solid ground for this rule is to be found in the very nature of rights of property and rights of labor, as we conceive of them in our form of government, and the difference between the two, recognized and sanctioned in the very nature of the constitutional guaranties extended to each.

This rule has never been denied by the result reached in any decision of this Court. On the other hand, it is supported in the reasoning of all the cases where a comprehensive discussion of the subject has occurred.

No change has taken place since the decision in *Adkins* v. *Children's Hospital*, supra, which would warrant a reversal of the Court's position enunciated in those cases, that minimum wage laws are an unconstitutional infringement on the liberty of contract guaranteed in the Fifth and Fourteenth Amendments to the Constitution.

Decisions of this Court on the precise question since that time indicate a strengthening rather than a relaxing of this principle.

Murphy v. *Sardell*, supra.
Donham v. *West-Nelson Mfg. Co.*, supra.
Wolff Packing Co. v. *Court of Industrial Relations*, supra.
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1, 10.
Tyson & Brother v. *Banton*, supra.
Radice v. *People*, supra.

Nor has any aspect of minimum wage laws developed which was not considered and determined in *Adkins* v. *Children's Hospital*.

The highest court of the State, construing its own laws, has found, as to the law now before this Court, "no material difference between the Act of Congress (considered in the *Adkins* case) and the act of the New York State Legislature", the difference being merely "in phraseology and not in principle."

Recently, on March 11, 1936, a three-judge Federal District Court in New Jersey held unconstitutional the minimum wage provision of the New Jersey statute* regulating the cleaning and dyeing trade, in *Kent Stores of New Jersey, et al.*, v. *Wilentz, Attorney General* (not yet reported), the Court saying:

> "The minimum wage provision, at least as at present drafted, does not meet the constitutional standard established by the United States Supreme Court under the due process clause of the Fourteenth Amendment."**

*Laws of N. J., 1935, Ch. 281.

**Quoted from U. S. Law Weekly, March 24, 1936, Vol. 3, No. 30, page 675.

CONCLUSION.

The question here is not one of discretion in determining the extent to which the legislative body may go in legislating for the public health, safety, morals or welfare *within* the police power. It is not a question of the reasonableness of the exercise of an admitted power. At the very base of the discussion is the question of the power to act at all. The question is whether the fixing of the price of labor is within the police power at all—not whether it is a proper exercise of that power.

It will not do to say that the fixing of prices is done as a "health measure" and that therefore it comes within the police power and the constitutional guaranties do not apply. By the same token it might be said that the mere existence of freedom of contract or private ownership of property, guaranteed by the Constitution, are themselves inimical to health, morals or safety and therefore the legislature has a wide discretion to restrict or eliminate them.

The question before the Court being one of *power*, because of the limitations upon legislative power in the constitutional guaranties, the statistics or opinions which induced the legislature to believe the law desirable, have no more controlling weight on the question than they would have on the question of the validity of a law requiring employers to hire none but union men or a law forbidding them to hire any but native born citizens.

In the business of earning a living, the right freely to choose among lawful ordinary employments and freely to bargain according to one's own estimation of the worth of his exertions of mind or body, is an inalienable right of citizens who are not wards of the state, and is of the essence of that "liberty" which it was the purpose of the Bill of Rights to secure. The denial of that right, however mild and benevolent that denial may be, is to make certain

free men and women wards of the state—a position wholly inconsistent with the guaranties of the Constitution, extended to all.

Respectfully submitted,

GATES & LEVITT,
Attorneys for Respondent.

NATHAN L. MILLER,
ARTHUR LEVITT,
HAROLD ALLEN GATES,
CHALLEN B. ELLIS,
of Counsel.

APPENDIX A.

THE PEOPLE OF THE STATE OF NEW YORK ex rel.
JOSEPH TIPALDO,

Appellant,

against

FREDERICK L. MOREHEAD, as Warden of the City Prison in the Borough of Brooklyn,

Respondent.

CRANE, Ch. J.: The appellant is the manager of a laundry establishment operating in the borough of Brooklyn. Together with three other individuals he was indicted by the grand jury of Kings county for the violation of the Minimum Wage Law for Women (Laws of 1933, ch. 584, in effect April 29, 1933). He was charged with the crime of paying to an adult woman employee a wage less than that promulgated by the Industrial Commissioner as the mandatory minimum wage applicable to such a woman engaged in that employment, in violation of section 565, subdivision 2, of the Labor Law (Cons. Laws, ch. 31). By this habeas corpus proceeding the relator seeks to test the legality of his arrest and imprisonment, raising as the only question before the court the constitutionality of the statute; for the violation of which he has been held for trial. His contention is that the law contravenes the Fourteenth Amendment of the Constitution of the United States, and article I, section 6, of the Constitution of the State of New York, both of which provisions are the same in this particular.

Chapter 584 of the Laws of 1933, thus attacked, is entitled, "An Act to amend the labor law, in relation to the determination and establishment of minimum fair wage

standards for women and minors, with provision for the imposition of penalties for the violation thereof." The applicability of the law as to minors is not questioned. The act provides the machinery for determining the minimum wage to be paid women in "an industry, trade or business or branch thereof or class of work therein in which women or minors are gainfully employed, but shall not include domestic service in the home of the employer or labor on a farm." (Labor Law, § 551, subd. 6.) The act defines "an oppressive and unreasonable wage" (§ 551, subd. 7) to be a wage which is both less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health. "A fair wage" (subd. 8) shall mean a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing the fair minimum wage the Commissioner and the wage board may take into account (1) all relevant circumstances affecting the value of the service or class of service rendered; (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of service rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid; and (3) may consider the wages paid in the State for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards.

Section 552 reads as follows: "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an oppressive and unreasonable wage as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void."

The rest of the act provides for the establishment of a wage board, for hearings, for the determination of the

minimum wage, and for the directory order of the Commissioner regarding the payment thereof.

Section 565, subdivision 2, for violation of which the relator has been indicted and imprisoned, reads as follows: "Any employer or the officer or agent of any corporation who pays or agrees to pay to any woman or minor employee less than the rates applicable to such woman or minor under a mandatory minimum fair wage order shall be guilty of a misdemeanor and upon conviction be punished by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, * * *."

We do not see wherein this act differs materially from the act of Congress ruled upon in *Adkins* v. *Children's Hospital* (261 U. S 525), wherein it was held that the Minimum Wage Act of September 19, 1918, chapter 174 (40 U. S. Stat. 960), was an unconstitutional interference with liberty of contract. The interpretation of the Federal Constitution by the United States Supreme Court is binding upon us; we are in duty bound to follow its decisions unless they are inapplicable. We find no material difference between the act of Congress and this act of the New York State Legislature. The act of Congress, it is said, was to protect women from conditions resulting from wages which were inadequate to maintain decent standards of living. The Attorney-General's brief states it in these words: "The purpose of the statute in the *Adkins* case was to guarantee a wage based solely upon the necessities of the workers. The statute did not provide for the wages to have any relationship to earning power; was applicable to all vocations and not to the character of the work. * * * As contrasted with this statute, the New York Minimum Wage Law provides a definite standard for wages paid. It provides that the worker is to be paid at least the value of the services rendered."

This is a difference in phraseology and not in principle. The New York act, as above stated, prohibits an oppressive and unreasonable wage, which means *both* less than the fair and reasonable value of the services rendered *and* less than sufficient to meet the minimum cost of living necessary for health. The act of Congress had one standard, the living wage; this State act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act. Forcing the payment of wages at a reasonable value does not make inapplicable the principle and ruling of the *Adkins* case.

The distinctions between this case and the *Adkins* case are differences in details, methods and time; the exercise of legislative power to fix wages in any employment is the same. We should follow the law as given, and not speculate as to the changes which have come or are supposed to have come to economic conditions in the last decade which may move the Supreme Court to a further consideration of its ruling. The *Adkins* case has not been lightly passed over nor its rulings forgotten. It was cited and followed in *Wolff Packing Co.* v. *Court of Industrial Relations* (262 U. S. 522); *Murphy* v. *Sardell* (269 U. S. 530); *Tyson & Brother* v. *Banton* (273 U. S. 418); *Donham* v. *West-Nelson Mfg. Co.* (273 U. S. 657); *Ribnik* v. *McBride* (277 U. S. 350), and *Near* v. *Minnesota* (283 U. S. 697).

When minimum wage laws somewhat similar to our own have been challenged since the *Adkins* case the courts have felt bound by that decision to declare them unconstitutional without re-examination of the principles involved in these particular statutes. (*Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12; *Folding Furniture Works, Inc.*, v. *Industrial Commission*, 300 Fed. Rep. 991;

Stevenson v. *St. Clair,* 161 Minn. 444; cf. *Holcombe* v. *Creamer,* 231 Mass. 99.)

The order below should be reversed, the writ sustained, and the prisoner discharged, as chapter 584 of the Laws of 1933, under which he is held, is unconstitutional according to *Adkins* v. *Children's Hospital* (261 U. S. 525).

LEHMAN, J. (dissenting): The appellant is held in custody under an indictment. By writ of habeas corpus proceedings he challenges the legality of his commitment. The indictment charges, we are told, that the appellant, as manager of the Spotlight Laundry, disobeyed a mandatory order, issued by the Industrial Commissioner under article 19 of the Labor Law (Cons. Laws, ch. 31), commonly known as the minimum wage law for women and minors (Laws of 1933, ch. 584) "prescribing certain minimum wages for certain adult women employees of the said laundry;" and that the appellant "conspired to make false entries in the time book of the said laundry for the purpose of making it appear that the said adult women employees did in fact receive the amount of wages," ordered to be paid by the Industrial Commissioner. The wrong charged in the indictment finds its roots in the statute, and the appellant attacks the statute as unconstitutional and void. The State raises no objections to the form of the attack. It concedes that the appellant's detention is lawful only if the statute is constitutional. That is the only question presented upon this appeal.

Minimum wage laws, *i. e.*, laws which require employers to pay to women and children employed by them a wage which shall not fall below a fixed minimum amount, have been enacted by many foreign countries; and, in the United States, sixteen States have enacted such statutes. So, also, the Congress of the United States in 1918 provided for the fixing of minimum wages for women and children in the District of Columbia. (40 U. S. Stat. 960, ch. 174.) Such a statute constitutes a restriction on freedom of contract

protected by the Fifth and Fourteenth Amendments of the Constitution of the United States. On that ground, the Supreme Court of the United States in *Adkins* v. *Children's Hospital* (261 U. S. 525), decided that the provisions of the Federal statute, there challenged at least in so far as they applied to adult women, violated the constitutional limitation upon legislative power. We are told that under that decision and for the same reasons which induced the Supreme Court to declare the Federal statute unconstitutional, we are bound to declare the New York statute void and unconstitutional.

There can be no doubt that the determination in that case that the Federal statute transcended the legislative power of Congress over the District of Columbia, made futile further argument that the statutes enacted by the various States, which were open to the same objections, should be sustained by the courts of those States. The Supreme Court of the United States must construe the provisions of the Constitution and its definition of inviolate rights guaranteed by the Constitution and of the division or restriction of powers thereunder must be accepted by all other courts of the country. A State court may previously have decided the same question. Such decision is of no effect after the Supreme Court of the United States has construed otherwise the Constitution which binds all, and when the same question arises again in a State court it must follow the decision of the Supreme Court regardless of its own opinion. (*Topeka Laundry Co.* v. *Court of Industrial Relations*, 119 Kan. 12; *Stevenson* v. *St. Clair*, 161 Minn. 444. Cf. *Sparks* v. *Moritz*, 141 Wash. 417.) The effect of the decision, there, is not measured by the persuasive force of the arguments which support it; for under any system of orderly administration of the law, it is the function of the court of last resort to pass finally upon the cogency of conflicting arguments and the weight of conflicting considerations. The effect is not

measured by the unanimity or lack of unanimity of the court, for the decision by a majority of one becomes the decision of the court. So Mr. Justice HOLMES, who dissented forcibly in the *Adkins* case, bowed to the decision as a precedent and concurred on that ground alone in later decisions of similar purport. (*Murphy* v. *Sardell*, 269 U. S. 530. Cf. *Donham* v. *West-Nelson Mfg. Co.*, 273 U. S. 657.)

That does not mean, of course, that a court of last resort may not reconsider the same question when it is again presented, and then reach a contrary conclusion. In the light of wider experience, broader information or changed conditions, the weight that should, reasonably, be given to conflicting considerations may change and error may become manifest. A Constitution may be amended only in manner provided therein, but a court which under the Constitution is charged with the duty of construing the Constitution may change its construction when convinced of error. That courts have not been willing to perpetuate a construction after they have been convinced of its unsoundness, has been a source of strength to our system of constitutional government. The Attorney-General, upon this appeal, argues that the statute now under consideration is free from the objections to the earlier "Minimum Wage" legislation, which the Supreme Court, in the *Adkins* case, held to be in violation of the provisions of the Constitution; but urges, also, that time and experience have demonstrated the soundness of the dissenting opinions there, and that the Supreme Court would now decide differently if the same objections were now presented. What the Supreme Court would now decide rests purely in conjecture, and even though we should assume that a court might under any circumstances properly base decision upon such conjecture, we should certainly hesitate to venture upon such an uncharted and treacherous sea. We start our consideration of the validity of the statute here challenged upon the assumption that the construction placed upon the

Constitution by the decision of the Supreme Court in the *Adkins* case is open to attack only in that court. Our personal views of the soundness of that construction then become irrelevant, except in so far as they might, perhaps even unconsciously, dictate our conclusion as to how far such construction should be carried.

Article 19 of the Labor Law, which the appellant now attacks, provides, in section 552 that "It is hereby declared to be against public policy for any employer to employ any woman or minor in an occupation in this state at an *oppressive and unreasonable wage* as defined in section five hundred and fifty-one of the article and any contract, agreement or understanding for or in relation to such employment shall be null and void." The definition contained in section 551 is "' an oppressive and unreasonable wage' shall mean a wage which is *both* less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health" (subd. 7). (Italics are ours throughout this opinion.) The same section defines "a fair wage" as "a wage fairly and reasonably commensurate with the value of the service or class of service rendered" (subd. 8). The statute then provides for the manner in which a "minimum fair wage" shall be fixed in occupations where "any substantial number of women or minors * * * are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one" (§ 554) and the manner in which employers in such occupations may be induced or compelled to pay the "minimum fair wage" so fixed.

The statute is unquestionably a "price fixing" statute. Ordinarily the price paid for labor, like the price to be paid for goods, is determined by agreement of the parties primarily concerned. The right by agreement to fix prices, whether of labor or goods, is part of the freedom of which no person may be deprived without "due process of law." The attack upon the statute is directed mainly to the point that the State violates this constitutional guaranty when-

ever it attempts to fix a fair wage for adults who are fully competent to enter into contracts fixing wages at a price which they are willing to accept, rather than reject employment offered to them at such wages. Inextricably interwoven in that attack are objections based upon the method of fixing "minimum fair wages" and the effect of the enforcement of payment of such wages as provided in this statute. We postpone analysis of the provisions for fixing the "minimum fair wage" and for enforcement of payment, until we have determined the extent of the power of the State to interfere in any form or manner with the free exercise of the right by adults of competent mental ability to fix wages by contract.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered." (*Adkins* v. *Children's Hospital, supra*, p. 546.) Thus in the case upon which the appellant here relies, it was authoritatively held that the State under *exceptional* circumstances may place some restraint upon freedom of contract. The difference of opinion in the court concerned only the question of whether the circumstances were so exceptional as to justify, reasonably, the restraints imposed.

The general rules which govern consideration of the validity of a statute which restricts liberty of contract are, indeed, too well established to be challenged now. Liberty of contract is "subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people." (*McLean* v. *Arkansas*, 211 U. S. 539, 547.) "The guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and sub-

stantial relation to the object sought to be obtained." (*Nebbia* v. *People,* 291 U. S. 502, 525.) Liberty to fix by contract the price of labor does not differ in its nature from liberty to fix other terms and conditions of employment though, it may be conceded, that restriction there may encroach more seriously upon the essentials of our economic competitive system. Thus, perhaps, circumstances which might reasonably justify restrictions upon contracts in matters less vital might be insufficient here. Here, too, however, there are many instances where the State has been justified in imposing restrictions under its reserved police power to legislate for the general welfare. The difference then is, at most, one of degree. "Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other." (*Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 439.) It is with the background of these general rules that we must analyze the provisions of article 19 of the Labor Law now challenged.

The Legislature in section 550 of that article has set forth the conditions which in its opinion called for the exercise of the reserved power of the State: "The employment of women and minors in trade and industry in the state of New York at wages unreasonably low and not fairly commensurate with the value of the services rendered is a matter of grave and vital public concern. Many women and minors employed for gain in the state of New York are not as a class upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their relations with their employers is illusory. Since a very large percentage of such workers are obliged from their week to week wages to support themselves and others

who are dependent upon them in whole or in part they are, by reason of their necessitous circumstances, forced to accept whatever wages are offered them. Judged by any reasonable standard, wages are in many cases fixed by chance and caprice and the wages accepted are often found to bear no relation to the fair value of the service rendered. Women and minors employed for gain are peculiarly subject to the overreaching of inefficient, harsh or ignorant employers and under unregulated competition where no adequate machinery exists for the effective regulation and maintenance of minimum fair wage standards, the standards such as exist tend to be set by the least conscionable employers. In the absence of any effective minimum fair wage rates for women and minors, the constant lowering of wages by unscrupulous employers constitutes a serious form of unfair competition against other employers, reduces the purchasing power of the workers and threatens the stability of industry. The evils of oppressive, unreasonable and unfair wages as they affect women and minors employed in the state of New York are such as to render imperative the exercise of the police power of the state for the protection of industry and of the women and minors employed therein and of the public interest of the community at large in their health and well-being and in the prevention of the deterioration of the race. In the considered judgment of the legislature this article is constitutional."

The appellant does not challenge these findings of fact by the Legislature, nor does he challenge the statements in the "factual brief" submitted by the respondent to sustain and amplify these findings. Though no reasonable man, today, can doubt the mental capacity of women and though, happily, in this country there are few vestiges of the ancient law which discriminated between men and women and incapacitated women from entering upon independent industrial, business or professional careers, yet it is notorious that in the free competition of such careers they

are at a disadvantage with men. The reason may be found in ancient prejudice, in custom, in training or in physical difference. Whatever may be the reason the fact is patent that often women are willing or forced to accept lower compensation for service than men receive in the same occupation. If wages constitute a "fair and reasonable value of the services rendered," perhaps it would be arbitrary to require an employer to pay more even though such wages be "less than sufficient to meet the minimum cost of living necessary for health." (Cf. *Adkins* v. *Children's Hospital, supra.*) If wages are *both* less than the "fair and reasonable value of the services rendered" *and* less than sufficient to meet the minimum cost of living necessary for health, some element of inequality or oppression may reasonably be found to enter into the bargain.

From wages so fixed a vicious chain of results may follow. The health of the underpaid women suffers, or they must become a burden upon their families or communities. That is a matter which is certainly of public concern and which might well engage the attention of the Legislature. It is clearly unjust that an unscrupulous employer should obtain the services of his employees upon payment of wages "less than the * * * value of the services rendered" and that the community should bear the burden of his cupidity. True, not all employers who pay such inadequate wages are unscrupulous. In unrestrained competition an employer can seldom afford to increase his costs beyond those paid by his competitors. Thus if in any occupation a considerable number of persons are employed at "oppressive and unreasonable wages" by those willing to profit by the weakness of their employees, more scrupulous employers may be driven to pay the same wages. Competition, however desirable generally, becomes unfair when one employer by the use of practices which, though not unlawful, are unjust and injurious to his employees or to the public, can force his competitors to the wall or compel them to avail themselves of the same practices. It has been held

in many cases that under such circumstances the Legislature may, within proper limits, restrain such practices. That is in the interest of proper competition.

The vicious result of oppressive wages does not stop even with the underpaid wage earner. It extends throughout the industry and in lesser degree even beyond the industry. Labor which for one reason or another is deficient in bargaining power has come to be known as "cheap labor," that is, labor which fails to obtain wages commensurate with the value of the services rendered. Just as experience has shown that, in a community where peonage or slavery exists, free labor cannot flourish, so in an industry, or even community, where oppressive wages are paid to those deficient in bargaining power, it is not unreasonable to believe that such wages affect indirectly but nevertheless very substantially the wages of all others. At least the Legislature might so find. It cannot then be gainsaid that the conditions which the Legislature found to exist call for some remedy. Indeed, the appellant does not seriously argue otherwise. The real question here presented is whether the remedy applied is reasonable and complies with the requirements of "due process," as defined by the Supreme Court, without which there may be no restriction upon liberty of contract.

Here we may profitably examine the prevailing opinion in *Adkins* v. *Children's Hospital* (*supra*) to determine whether the statute now under consideration is subject to the objections which dictated the conclusion of the court in that case. In that case the statute provided for the fixing of standards of minimum wages for women in any occupation adequate "to supply the necessary cost of living to women workers * * * to maintain them in health and to protect their morals." No other standard was there prescribed. It was there said that "while the physical differences [between men and women] must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we

cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances" (p. 553). We accept that statement with all its implications.

The Legislature has then no greater power to restrict the liberty of women than of men. All are equally entitled to the protection of the law, and, in regard to all, liberty of contract is the rule, and restriction can be justified only by exceptional circumstances. What was said by the court can mean only that. None the less, just as in legislation in relation to health, the physical differences between men and women may properly be taken into account so in legislation in other fields, the Legislature cannot reasonably be required to disregard actual conditions which affect women differently from men. The test in each case is whether the conditions justify the remedy regardless of whether those conditions affect men or women. Classification must of course be based upon actual conditions, not outworn theories of sex inferiority or superiority. In the *Adkins* case the question was whether the Legislature could require an employer to pay minimum wages to women sufficient to maintain them in good health and to protect their morals, regardless of the value of the service rendered. The court held that such a requirement is unreasonable in its nature and not justified because it is confined to women. In this case the question is whether employers can be compelled to pay women wages which are not "oppressive." There is here no contention that the legislation is justified on the ground that the Legislature may restrict the liberty of women where it could not restrict the liberty of men. The Legislature has found that women are not "*as a class* upon a level of equality in bargaining with their employers in regard to minimum fair wage standards, and 'freedom of contract' as applied to their

relations with their employers is illusory" (§ 550). Undoubtedly there is ground for the belief that women are paid less than men in most occupations. That groups of men may also be paid "oppressive" wages may be entirely true. Perhaps they, too, should be protected by similar legislation. Upon that question we are not now called upon to pass. It is sufficient to point out that here the Legislature has not unlawfully discriminated between groups or sexes. Since it might reasonably be found that in the unrestrained play of economic forces, women as a class are at a disadvantage, with resultant injury to the general welfare, the Legislature might in its discretion adopt legislation, confined to them, which is reasonably adapted to meet the conditions peculiarly affecting them. The distinction is not based upon assumed need to protect the health or morals of women but upon the need of protecting the public against the evil of "oppressive" wage contracts imposed upon women because of economic conditions peculiarly affecting women. So in this case, as in the *Adkins* case, the fundamental question is whether the remedy is reasonable and appropriate.

In the *Adkins* case the court said that the law forbids "two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee" (p. 554). That criticism might be applied to the earlier statute; it has no application here, for, as we have shown, the Legislature might reasonably find that acceptance of a contract for wages less than the reasonable value for services rendered and less than the minimum cost of healthful living must from its nature be induced by the necessities of the wage earner rather than by any opinion that the employment is "desirable." Then

the court said: "the price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment; and, while it has no other basis to support * * * the necessities of the employee, it takes no account of any independent resources she may have" (p. 555). Again, this objection does not apply to the statute now challenged. It has, as we have shown, other basis than the "necessities of the employee." Its basis is rather that wages which bear no fair relation "to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment;" in other words, relation to all those conditions might enter into the measure of fair compensation for the value of services, are not fair wages; and when in addition, they are insufficient to maintain the health of the employee, such wages are detrimental to the general welfare.

The next source of invalidity in the *Adkins* case is the uncertainty of the standard to be applied in fixing the minimum wages which must be made. There the formula to be applied was the "necessary cost of living to women workers to maintain them in health and to protect their morals." Here the formula to be applied *in fixing wages* is that of "a fair wage" as defined by the statute, *i. e.*, "a wage fairly and reasonably commensurate with the value of the service or class of service rendered" (§ 551, subd. 8). The necessities of the employee do not enter into that standard. True, under the statute, jurisdiction to fix fair wages is made dependent upon a finding that the wages paid to a substantial number of women or minors is "less than * * * the minimum cost of living necessary for health" (§ 551, subd. 7), but even though, as the Supreme Court has pointed out, the necessary cost of living is not "a

precise or unvarying sum," yet obviously there must be a point where determination with reasonable certainty is possible that wages paid are *less* than the necessary cost of living to maintain a woman in good health. Thus the objection to the standard in the statute considered in the *Adkins* case has no application here. We postpone consideration whether similar objections might be raised to the standards to be applied under the present statute until after we have completed analysis of the objections set forth in the opinion in the *Adkins* case.

It is further said in that opinion that "the law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. * * * It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. * * * To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole" (p. 557).

Here we reach the crux of the objections which, in the opinion of the Supreme Court, rendered the earlier statute arbitrary and unreasonable and here, too, it is evident that the Legislature, in the new statute, recognized these objections and sought to provide a remedy which should be free from them. Assuming that it is possible to measure, in accordance with the provisions of the statute, the "value of the service or class of service" rendered, it is clear that a requirement that the employer shall not be permitted to pay less than such value does not "compel the employer to pay a sum which the employee is not capable of earning," nor can it fairly be said that the law compels payment irrespective of the ability of the business to bear the burden, for with the exception perhaps of a business which can exist only through practices which are unfair and economically unsound, a business must ordinarily be able to bear the burden of paying fair compensation for service given to the business. An employer who pays wages less than that, and less than the cost of healthful living, places upon society the burden of paying part of the legitimate costs of the business.

That these differences are vital appears from the opinion itself in the *Adkins* case, for it continues: "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is *not the value of the service rendered*, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals" (p. 558). The exact opposite is true in this case. "The moral requirement implicit in every contract of employment, viz., that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is

completely ignored'' in the earlier statute. It is not ignored here. Indeed what the statute aims to do is to declare that ''the moral requirement implicit in every contract of employment'' cannot be excluded by agreement of parties where through such exclusion the general welfare may suffer. Indeed, the court went further in the *Adkins* case and expressly pointed out that a statute like the one under consideration might not be subject to the objections there held insuperable, saying: ''A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, *to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service,* would be understandable. But a statute which prescribes payment without regard to any of these things and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States'' (p. 559).

We have assumed, so far, that the provisions for fixing wages are fair and provide a standard which can be applied by administrative officers. That assumption must now be tested by analysis of the statute itself. The statute does not require that every employer shall pay a minimum ''fair'' wage, nor that at his peril and to avoid criminal prosecution, any employer must determine what is a ''fair'' wage. An employer must pay such a wage only where such a wage has been fixed for a particular service or class of service in a particular industry by administrative order, and where a further order has been made requiring employers in that industry to pay the minimum wage so fixed. Such an order may be made only when, on the basis of information in the possession of the Industrial Commissioner or the Director of the Minimum Wage Bureau, the Commissioner is of opinion that ''any substantial number

of women or minors in any occupation or occupations are receiving oppressive and unreasonable wages as defined in section five hundred and fifty-one." Even then he may not proceed summarily to make an order fixing wages, but must "appoint a wage board to report upon the establishment of minimum fair wage rates for such women or minors in such occupation" (§ 554).

The Minimum Wage Board must be composed of not more than three representatives of the employers in any occupation or occupations, an equal number of representatives of the employees in such occupation or occupations and not more than three disinterested persons representing the public. "Within sixty days of its organization a wage board shall submit a report including its recommendations as to minimum fair wage standards for the women or minors in the occupation or occupations the wage standards of which the wage board was appointed to investigate." (§ 555, subd. 4.) That means "a wage fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum fair wage for any service or class of service under this article the commissioner and the wage board without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, and (2) may be guided by like considerations as would guide a court in a suit for the reasonable value of services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid in the state for work of like or comparable character by employers who voluntarily maintain minimum fair wage standards" (§ 551, subd. 8).

It is said that the standard of fair value of services is too indefinite for accurate application. It is true that value is ordinarily determined by competitive agreement,

and here, it is plain, the Board is required to fix a value different from the value fixed by such agreement. Courts and juries are at times required to fix values when there is no market price, and many price-fixing statutes have been sustained in occupations affected by a public interest, though there, too, the same difficulty may exist. The difficulty is met if some reasonable basis exists for fixing wages. Before a report of the Wage Board becomes effective there must be a public hearing, and only when the Commissioner, after such hearing, has approved, can any order be made fixing the "fair wage." (§§ 556 and 557.) Even then the order remains only directory for nine months. It can be made mandatory thereafter, but only upon a new public hearing. (§ 560.) At any time after an order fixing such wages, whether directory or mandatory, has been in effect a year, there must be a reconsideration of the wage upon the petition of fifty or more residents of the State. (§ 561.) In addition there is a "right of review by the industrial board, and the courts from any ruling or holding on a question of law included or embodied in any decision or order of the commissioner or the director" (§ 563), and upon such review the reasonableness of any rule or order may be challenged. (Labor Law, art. 3.)

An order so made seems to comply in all respects with constitutional requirements. The Legislature has set a standard which must guide the administrative officers. Though the standard cannot be applied mechanically, it is sufficient in most cases to admit of conclusions reasonably drawn from the evidence presented and which can be tested by application of rules of reason. The statute provides a hearing to all persons affected and a judicial review of the reasonableness of the conclusions drawn. There may, quite possibly, be exceptional cases where no evidence can be produced, from which any conclusion can logically be drawn. Then any person may attack the reasonableness of the finding. No such attack is here made, and an

examination of the report of the Wage Board shows ample evidence to support its conclusion.

Doubtless, in the application of the statute, hardship to individuals may at times arise. Argument may be made that economic wrongs are best corrected by the free play of economic forces. Doubtless that consideration has dictated the conclusion of the courts in many cases where statutes restricting competition have been declared unconstitutional. Our economic system is based upon competition, and when we say liberty of contract is the rule and restriction can be justified only by exceptional circumstances, we probably mean just that. None the less, restrictions within reasonable limits and upon reasonable grounds are justified, and so long as the Legislature does not exceed those limitations it must determine whether the price that must be paid for restrictions is justified by the results that may reasonably be expected from such restrictions. It is said that if the court permits the fixing of minimum prices, it must also permit the fixing of maximum prices. The problem is not so simple. We hold only that in this case the Legislature might reasonably fix minimum prices for women because within the limited field covered by the statute some employers have taken advantage of the economic weakness of women to the public injury. Competition there, it has been found, has been at times illusory, and at times unfair and has worked injury to the general welfare. Whether a law fixing maximum prices could ever be justified by circumstances so compelling as to render the law reasonable is not involved. Price fixing by free contract must remain unrestrained so long as it does not injure the public welfare. In each case the test is whether the restriction is justified and in conformity to "due process."

Here, it may be interesting to observe that in this case no employer or employee has challenged the fairness of the wage fixed or claims it may result in injustice. The Wage Board agreed unanimously upon the amount of a

fair wage in the laundry industry. No person appeared at the public hearings to object to the wage so fixed. No person sought a review of the order by appeal to the Industrial Board. The order has been in force for several years and there has been no application for a reconsideration. Even upon this appeal, a brief in support of the law has been filed by a trade association of owners of laundries, and the only person attacking the law is the appellant who has been charged with concealment by false entries of disobedience of the law. In such circumstances it can hardly be said that, at least in so far as concerns the laundry business, the statute or the wage fixing order is unfair or unreasonable. When orders are issued fixing wages of women in other occupations the courts may be called upon to decide whether they are reasonable and justified by the evidence.

We are told that this statute, though enacted primarily for the protection of women, may eventually result in injury to them; for some employers may prefer to employ men if they can obtain male employees for less wages than the law requires for women employees. That adult male employees of equal efficiency can be obtained at less than the minimum wage fixed for women and minors is contrary to common experience and contrary to the findings of the Legislature. Under these circumstances, that objection is one which the Legislature might reasonably disregard. If in truth it should appear that any substantial number of men have because of price fixing orders supplanted women in any industry, that might be convincing evidence that the orders were unreasonable. No such contention has been made by the appellant.

We are further told that such orders may work hardship to industries in some districts. The statute has provided against that. "5. A wage board may differentiate and classify employments in any occupation according to the nature of the service rendered and recommend appro-

priate minimum fair rates for different employments. A wage board may also recommend minimum fair wage rates varying with localities if in the judgment of the wage board conditions make such local differentiation proper and do not effect an unreasonable discrimination against any locality." (§ 555.)

It is argued that the differentiation is permissive, not mandatory. That may be true, but a permissive right to differentiate becomes mandatory where failure to exercise it would be unreasonable. There as elsewhere the judgment of the Board is subject to judicial review.

We have considered all the objections urged by the appellant or which have occurred to us, though perhaps the consideration of some of these objections rests exclusively with the Legislature. Doubtless some persons may suffer hardship. There may be some women replaced by other women of greater efficiency. Some businesses, which are economically unsound, may be discontinued. Such individual hardships may be the result of any restriction upon competition, but greater hardships of the same kind may be the result also of unrestrained competition, especially where that competition is tainted with overreaching or other unfair practices. The Legislature doubtless weighed these objections, they are not so weighty that a court should say the Legislature could not reasonably find that they are over-balanced by countervailing anticipated benefits.

Can such a statute be declared unconstitutional by the courts? The conditions which the Legislature seeks to remedy are not imaginary. The Legislature might reasonably find that they are caused by oppressive exercise of liberty of contract, and that removal of such conditions is necessary for the general welfare. The remedy devised is reasonably calculated to end those conditions, though perhaps the remedy may carry in its train other evils. The remedy is on the whole not unfair to employers or to employees; though individuals may suffer hardship.

Other countries with traditions similar to our own have adopted remedies more drastic to meet analogous conditions. The restriction upon liberty of contract is directed against a harmful and perhaps unfair use of that liberty. The constitutional limitations upon legislative power must be enforced by the court, but they may not be extended beyond their fair meaning. Liberty of contract, like other forms of liberty, must be zealously guarded against invasion by the State, but fear that in the future the State may encroach by unreasonable legislation upon the liberties of the individual cannot justify a present limitation upon the powers of the State, not expressed or clearly implicit in the Constitution. Liberty may be reasonably restrained upon grounds of general welfare. Courts must decide each case upon the facts there presented; upon the facts presented in this case we do not find any ground for saying that the Legislature has acted arbitrarily or transcended the limitations upon its powers.

The order should be affirmed, with costs.

O'Brien, Hubbs and Finch, JJ., concur with Crane, Ch. J.; Lehman, J., dissents in opinion in which Crouch and Loughran, JJ., concur.

Ordered accordingly.

APPENDIX B.

MANDATORY ORDER NO. 1 GOVERNING WOMEN AND MINORS IN LAUNDRY OCCUPATIONS

WAGES—Women and Minors employed at laundry occupations shall be paid a Minimum Fair Wage at rates not less than the following:

	NEW YORK CITY AREA	OUTSIDE NEW YORK CITY
BASIC RATE FOR A FULL WORK WEEK OF 40 HOURS:	**31¢ PER HOUR** or **$12.40 PER WEEK**	**27½¢ PER HOUR** or **$11.00 PER WEEK**
PAYMENT FOR UNDERTIME FOR A WEEK OF LESS THAN 40 HOURS:		
A bonus of 10 per cent shall be added to the basic rate per hour, until the wage paid for the week's work is equal to the wage paid for a basic 40 hour week—(i.e., $12.40 and $11.00 respectively).	**34 1/10¢ PER HOUR** or 10 per cent added to 31¢ per hour for a week of **LESS THAN 37 HOURS.**	**30¼¢ PER HOUR** or 10 per cent added to 27½¢ per hour for a week of **LESS THAN 37 HOURS.**
	$12.40 A WEEK for a week of **37-40 HOURS** inclusive.	**$11.00 PER WEEK** for a week of **37-40 HOURS** inclusive.
PAYMENT FOR OVERTIME FOR A WEEK OF MORE THAN 40 HOURS:		
For the first five hours beyond the basic 40 hours, the basic rate shall be paid.	**31¢ PER HOUR.**	**27½¢ PER HOUR.**
Time and a half rates shall be paid for each hour after the 45th.	**46½¢ PER HOUR** or 50 per cent added to 31¢ per hour.	**41¼¢ PER HOUR** or 50 per cent added to 27½¢ per hour.

ADMINISTRATIVE REGULATIONS

1. **PIECE WORK.** Women and minors employed on a piece work basis shall be employed at piece work rates which yield to each such employee rates not less than the minimum fair wage standards established for time workers under Mandatory Order No. 1.

2. **MINORS AND LEARNERS.** The same minimum fair wage standards which apply to women over 21 shall apply to all women and minors except such as may be specially licensed under regulation 3. No learners and no apprenticeship period shall be recognized.

3. **HANDICAPPED.** No woman or minor whose earning capacity has been impaired may be paid at less than the minimum fair wage standard, until a special license, in accordance with the provisions of Section 558 of the Labor Law, has been obtained by the employer from the Division of Minimum Wage.

4. **WAITING TIME.** Time during regular working hours, and at other periods when employees are required to wait on the premises and no work is provided by the employer, shall be counted as working time and paid at the individual employee's regular wage rate.

5. **STATEMENT TO EMPLOYEE.** With every wage payment to each employee subject to Mandatory Order No. 1, there shall be given a statement in a form prescribed by the Commissioner, explaining the rates and earnings received under the minimum fair wage standards established by this order.

6. **PAYMENT OF WAGES.** For hotels, institutions and other establishments which are not covered by Section

195 of the Labor Law (requiring cash payment for the industries therein enumerated except when special permit is obtained) the following regulations shall govern:

A. **TIME OF PAYMENT.** Wages shall be paid weekly and shall be received by the employee within six days after each week's wages have been earned.

B. **MEALS AND LODGING.** No deductions shall be made from the minimum fair wage rate for meals or lodging, or both, furnished to any employee by the employer, until the employer's application for such deduction has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

C. **UNIFORMS.** Where uniforms are used, the employer shall in no case make deductions of more than a fair charge for, and in no case more than the actual cost of the uniforms. No deductions may be made for uniforms, until the employer's application for such deductions has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

D. **SERVICE ALLOWANCES AND OTHER DEDUCTIONS.** No deductions shall be made from the minimum fair wage rate on account of insurance or for any other service or for any other cause until the employer's application for such deduction has been reviewed and approved by the Division of Minimum Wage, and a special permit issued and posted accordingly.

7. **RECORDS.** Each employer shall keep a record, in a form prescribed by the Industrial Commissioner, of the hours and wages of each employee, and shall, on demand, submit a sworn copy of such record to the Commissioner or his representative, together with such information as the Commissioner may in his discretion deem necessary.

8. **CERTIFICATE OF AGE.** For purposes of this order each employer shall keep on file a certificate of proof of age for each male minor under 21 years of age employed at laundry occupations.

9. **POSTING.** A notice issued by the Department of Labor, setting forth the provisions of Mandatory Order No. 1 and administrative regulations, shall be posted in a conspicuous place in every room where women and minors are employed at laundry occupations.

10. **INSIGNIA OF COMPLIANCE.** The Commissioner may hereafter, at his discretion, issue an insignia of compliance which the employer, upon proof of compliance with the mandatory order and administrative regulations, may thereafter display and be entitled to use.

This order shall come into force and be effective on and after August 6, 1934.

Dated New York, August 1, 1934.

ELMER F. ANDREWS,
Industrial Commissioner.

PENALTIES

FAILURE TO PAY RATES ESTABLISHED UNDER MANDATORY ORDER No. 1 is a misdemeanor, punishable by a fine of not less than fifty nor more than two hundred dollars or by imprisonment of not less than ten nor more than ninety days or by both such fine and imprisonment, and each week in any day of which an employee is paid less than the established minimum rates and each employee so paid less shall constitute a separate offense.

Any woman or minor paid less than the established minimum rates may recover in a civil action the full amount due him together with costs and such reasonable attorneys' fees as may be allowed by the court, and any agreement between him and his employer to work for less than the established minimum rates shall be no defense to such action. At the request of any woman or minor paid less than the minimum wage to which he was entitled the Industrial Commissioner may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim.

DISCRIMINATION AGAINST OR DISCHARGE OF ANY EMPLOYEE because of participation in any investigation or hearing relating to the Minimum Fair Wage Act is a misdemeanor, punishable by fine of not less than $50 nor more than $200.

FAILURE TO KEEP OR FURNISH THE RECORDS REQUIRED is a misdemeanor, punishable by fine of not less than $25 nor more than $100, each day of such failure to keep or furnish the records required constituting a separate offense.

DEFINITIONS

1. **MINORS.** All workers under 21 years of age.

2. **LAUNDRY OCCUPATIONS.** All processes directly concerned with the cleansing, collection and distribution of laundry wares. It shall not include occupations concerned with plant maintenance or office workers.

3. **NEW YORK CITY AREA.** The City of New York and all territory in Westchester County and Long Island within a distance of 15 miles from the New York City line.

4. **CERTIFICATE OF AGE.** A minor over 17 years of age may apply for a certificate of age to the superintendent of schools or to an employment certificating officer. The certificate, signed by the officer issuing it, must contain the name, date of birth, address and signature of the applicant and shall be issued on such evidence that he is over 17 years of age as is required for the issuance of an employment certificate.